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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY
COMPANY AND A. J. CARNEY, PETITIONERS,

vs.

FRED WARD.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OKLAHOMA.

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1 [On margin:] Entry of App. & Waiver of Summons, p. 277.

Filed Sep. 8, 1915. William M. Franklin, Clerk.

No. 7646.

In the Supreme Court of the State of Oklahoma.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND
A. J. CARNEY, Plaintiffs in Error,

vs.

FRED WARD, Defendant in Error.

Petition in Error.

Said The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, and A. J. Carney, plaintiff in error, severally allege that at all times mentioned in the pleadings in said case-made, it The Chicago, Rock Island & Pacific Ry. Co. was a corporation organized and existing according to law, under and by virtue of the laws of the states of Illinois and Iowa, with its principal place of business in the City of Chicago in said State of Illinois, and up to and including April 19, 1915, operated, owned and maintained a line of railroad running from the said City of Chicago in said State of Illinois, into and through the state of Oklahoma, and that at all times mentioned in the petition of the defendant in error herein, and at the time of the alleged accident to the said defendant in error, on or about December 20, 1913, the said The Chicago, Rock Island and Pacific Railway Company was doing the business of an interstate common carrier into and through the states intervening between the State of Illinois and the State of Oklahoma and into and through the State of Oklahoma and the county of Pottawatomie and City of Shawnee, therein; and that the said A. J. Carney was at all times mentioned in the petition of the defendant in error herein, and now is a citizen of the state of Oklahoma and a resident

of the City of Shawnee, Pottawatomie County therein, and
2 that on February 26, 1915, said defendant in error, Fred Ward, as plaintiff, obtained a verdict against the said plaintiffs in error as a corporation and individually, in a cause of action in the Superior Court of Pottawatomie County, State of Oklahoma, by the consideration of the court, upon which a judgment was entered for the sum of Three Thousand (\$3,000.00) Dollars, in which said cause of action, these plaintiffs in error were defendants and the defendant in error was plaintiff, and that the separate motions of the above named plaintiffs in error were separately overruled on March 10, 1915, and the original case-made of said judgment and the

pleadings and proceedings had in said court are hereto attached and made a part of this petition in error.

The said The Chicago, Rock Island and Pacific Railway Company and the said A. J. Carney, plaintiffs in error, severally allege that there is manifest error in said judgment and proceedings, affecting materially the substantial rights of the said plaintiffs in error and each of them, in this, to-wit:

First. That the trial court erred in overruling the demurrer of the plaintiff in error, A. J. Carney, to the petition of the defendant in error (case-made p. 9).

Second: That the trial court erred in overruling the separate demurrer of the plaintiff in error, The Chicago, Rock Island and Pacific Railway Company, to the petition of the defendant in error (case-made p. 7).

Third: That the trial court erred in overruling the motion of the plaintiff in error, The Chicago, Rock Island and Pacific Railway Company for a new trial (case-made pp. 211, 213).

Fourth: That the trial court erred in overruling the separate motion of the plaintiff in error, A. J. Carney, for a new trial (case-made pp. 221, 223).

3 Wherefore, said plaintiffs in error and each of them, severally pray that the said judgment be reversed, set aside and held for naught, and that this cause be remanded to the trial court.

C. O. BLAKE,
R. J. ROBERTS,
W. H. MOORE,
J. G. GAMBLE,
K. W. SHATTELL,
Attorneys for Plaintiffs in Error.

4 to 7 In Superior Court, Pottawatomie County, Okla. No. 2114.
Fred Ward v. C. R. I. & P. Ry. Filed Sep. 8, 1915. William M. Franklin, Clerk.

8 In the Superior Court of Pottawatomie County, State of Oklahoma.

No. 2114.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
A. J. CARNEY, Defendants.

No. 2114.

Filed in Superior Court, Aug. 13, 1915, Pottawatomie County, Okla. R. L. Flynn, Court Clerk, by Harry Watts, Deputy.

Case Made.

Filed Sep- 8, 1915. William M. Franklin, Clerk.

Appearances:

W. S. Pendleton and T. G. Cutlip, for Plaintiff.
R. J. Roberts and Edward Howell, for Defendants.

Honorable Leander G. Pitman, Judge.

Be it remembered that on the 17th day of February, 1914 there was filed in the Superior Court of Pottawatomie County, State of Oklahoma, a petition in an action brought by Fred Ward as plaintiff, vs. The Chicago, Rock Island and Pacific Railway Company and A. J. Carney as defendants, No. 2114 in said Court, to which petition separate answers were filed by the defendants, issues made up and a trial had thereupon. Subsequently a new trial was granted the defendants and thereafter a second trial was had upon the same issues as in the first trial. The issues, as set forth by said petition, upon which the issues were joined in the second trial, is in words and figures as follows, to-wit:

9 In the Superior Court of Pottawatomie County, State of Oklahoma.

FRED WARD, Plaintiff,

vs.

THE C., R. I. & P. RAILWAY COMPANY et al., Defendants.

Petition.

Now comes Fred Ward, the plaintiff in the above entitled cause, complaining of the defendants, The Chicago, Rock Island & Pacific Railway Company and A. J. Carney, and for cause of action herein, respectfully avers and shows unto the court:

First. That the defendant, The Chicago Rock Island & Pacific Railway Company is a foreign corporation, chartered under the laws, of the state of Illinois, and is authorized by law to own, maintain and operate a railroad system for the carriage of passengers and freight, and to build and maintain railway shops, for the purpose of construction and repair. That the defendant, A. J. Carney, resides in the County of Pottawatomie, State of Oklahoma.

Second. That the defendant Railway Company maintains and operates, and did own, maintain and operate, at the times herein-after mentioned, extensive railway shops and switching grounds, in the City of Shawnee, State of Oklahoma. That on or about the 10th day of December, 1913, plaintiff was in the employment of said de-

fendant Railway Company, as a switchman, in the switch yards of said defendant Railway Company, in the City of Shawnee, aforesaid, working under the defendant, A. J. Carney, who was then and there an engine foreman in the employment of the defendant Company.

Third. That on the date last mentioned, at about 10 o'clock P. M., a large train of freight cars, about 20 in number was drawn in the City of Shawnee, by engine number —, upon the main track of the defendant Company's line of road, passing through the City of Shawnee. That under the directions of said A. J. Carney, engine foreman as aforesaid, a considerable number of said freight 10 cars, towit—about 20 cars were cut off from said train, and drawn by said engine to a point near where a switch, known as switch No. 10 was located, and on which were already stationed certain cars, and then the cars which were cut off from said train as aforesaid, were shoved by said engine upon a certain switch which lead from the main track to said switch No. 10. That the grade of said switch was such that the said car after being shoved thereon as aforesaid, and after being cut loose from the engine aforesaid, would by the force of gravity roll along said switch until such time as the same would be stopped by the switchman. That it was the duty of the engine foreman, to see that as soon as said cars should be shoved upon said switch of the aforesaid, they should be cut loose from said engine and permitted to run down the grade of said switch until stopped by the switchman. That plaintiff was the only switchman in charge of said cars at the time last mentioned, and was on the top of the rear car of said train, that is on the top of the car furthest from the said engine, which said car could be in the front as the said train was being shoved on said switch, that it was the duty of said engine foreman, A. J. Carney, by proper directions to cause the said cars, after they had passed upon said switch to be uncoupled from said engine so that they might — down to the proper place on said switch under control of plaintiff, who was then and there a switchman as aforesaid. It was the duty of plaintiff as soon as the said cars were uncoupled from said engine to so manipulate the said brakes on said cars as to regular- the speed thereof and keep them under control, so that they might be stopped at the proper place. That the said front car on which plaintiff was at said time was about twenty car lengths from the said engine that plaintiff knowing that said cars had been shoved upon said switch as aforesaid, and knowing it was then and there duty of said engine foreman to cause the said cars to be uncoupled from said engine, and by reason of obstructions in the way, being unable to see any signal 11 made by said engine foreman, if any was given, noticed the said engine had ceased to exhaust it being then and there the duty of the said engine foreman to cause the said engine to be so uncoupled from the said cars—the plaintiff then and there as it was his duty went quickly from his said position about the middle of the top of the front car on which he was standing to the front end of said car to apply the brake, in order to diminish the speed of said cars and stooped over to take hold of said brake. But plaintiff avers

that the said engine foreman, the defendant A. J. Carney, and the defendant Company, by and through the said foreman, negligently and in violation of their duty as aforesaid caused the engineer on the said engine to turn the throttle (thereby making the said engine cease to exhaust), and to apply the air brakes to said engine, whereby the speed of said engine was retarded, so that the said engine ceased to shove said cars and began to move more slowly than the said cars were moving, with the result that said cars began to check up in speed violently one at a time, until finally the checking impulse reached the front car aforesaid just as plaintiff was stooping over as aforesaid to turn said brake, when said car was checked in motion so violently and so suddenly, that plaintiff was thrown over in front of said car to the ground between the tracks of said road bed, a distance of about twelve feet; and plaintiff, being so near the moving car coming towards him, and being so wounded and stunned by the said fall, that he could not rise to his feet.

Plaintiff avers that by reason of said fall he struck the draw-bar on said car with his hip and being a heavy man, weighing about 170 pounds, his hip joint was thereby greatly bruised and sprained, giving him great and excruciating pain, from which plaintiff still suffers greatly at the date of filing this petition; and by reason of said fall plaintiff's left foot, striking with great force against and in the frog of a switch of said track, was crushed and bruised by said

fall and being wedged tightly in said frog was violently 12 wrenched from said frog by a blow of the draw-bar of said moving car, so that the bones thereof were broken and misplaced, causing plaintiff great pain and suffering, and as plaintiff believes and charges, partially disabling plaintiff for life.

Plaintiff avers that his injuries aforesaid were caused by the defendant's negligence in failing through the said engine foreman to promptly uncouple said cars at said time plaintiff avers that by reason of said injuries and his said suffering and wounds and bruises, and in loss of time and in being permanently disabled, he has been damaged in the sum of \$10,000.00, for which he prays judgment.

W. S. PENDLETON,
Attorney for Plaintiff.

FRED WARD, Plaintiff,

vs.

THE C., R. I. & P. RAILWAY CO., Defendant.

Affidavit.

I, Fred Ward, do solemnly swear, that I am the plaintiff in the above entitled cause; that I am acquainted with the contents of the above petition; that I verily believe my cause of action therein stated is just; and that by reason of my poverty I am unable to give security for costs therein.

FRED WARD.

Subscribed and sworn to before me this 17 day of February, 1914.

Endorsed: 2114. Fred Ward, P'tiff, vs. The C., R. I. & P. Ry. Co. Petition filed Feb. 17, 1914. W. K. Dunn, Clerk Superior Court, by C. C. T. Deputy. Lien Claimed W. S. Pendleton, Atty for P'tiff. Oct. 7, 1914 at 11.40 o'clock A. M. Filed in Superior Court, Aug. 13, 1915, Pottawatomie County, Okla. R. L. Flynn, Court Clerk, by Harry Watts, Deputy.

13 Be it further remembered that afterward and on the 17th day of March, the defendant, The Chicago, Rock Island and Pacific Railway Company filed its separate demurrer to the petition of the plaintiff, which demurrer is in words and figures as follows, to-wit:

14 In the Superior Court of Pottawatomie County, Oklahoma.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY
et al., Defendants.

Separate Demurrer of the Defendant, The C., R. I. & P. Ry. Co.

Comes now the defendant, The Chicago, Rock Island and Pacific Railway Company, and demurs to the petition of the plaintiff herein on the ground that the petition of the plaintiff herein does not state facts sufficient to constitute a cause of action against this defendant and in favor of the plaintiff.

Whereof, defendant prays judgment of the court.

EDWARD HOWELL,
C. O. BLAKE,

Attorneys for Defendant The C., R. I. & P. Ry. Co.

Endorsed: 2114. Filed Mar. 17, 1914. W. K. Dunn, Clerk Superior Court, By C. C. F., Deputy.

15 Be it also remembered that on the same 17th day of March, 1914, the defendant, A. J. Carney, filed his demurrer to the petition of the plaintiff herein, which said demurrer was in words and figures as follows, to-wit:

16 In the Superior Court of Pottawatomie County, Oklahoma.

No. 2114.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY
et al., Defendants.*Separate Demurrer of the Defendant A. J. Carney.*

Comes now the defendant, A. J. Carney, and demurs to the petition of the plaintiff filed herein, on the ground that the petition of said plaintiff herein does not state facts sufficient to constitute a cause of action against this defendant and in favor of the plaintiff.

Whereof, defendant prays judgment of the Court.

EDWARD HOWELL,

C. O. BLAKE,

Attorneys for Defendant A. J. Carney.

Endorsed: 2114. Filed Mar. 17, 1914. W. K. Dunn, Clerk Superior Court. By C. C. F., Deputy.

17 Thereafter and on the 23rd day of March, 1914, the foregoing demurrs of the defendants, the said A. J. Carney and the said The Chicago, Rock Island and Pacific Railway Company coming on for hearing by the Court and after due consideration were separately each overruled by the Court and an exception allowed to each of said defendants to the order of the Court made in overruling the separate demurrs of the said defendants.

18 Be it further remembered that subsequently, and on the 8th day of April, 1914, the defendant, The Chicago, Rock Island and Pacific Railway Company filed with the Clerk of said Court, its Motion to Strike, wherein it prayed that the Court order the plaintiff to strike certain parts from his petition, which said motion to strike was in words and figures as follows, to-wit:

19 In the Superior Court of Pottawatomie County, State of Oklahoma.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Defendant.*Motion to Strike.*

Comes now the defendant in the above entitled cause by its attorneys, the undersigned, and moves the Court to strike from the

petition of the plaintiff filed herein the following passages for the reason that they contain matter that is incompetent, irrelevant and immaterial to the issues of the case and tend to confuse the Court and jury in the consideration of the real issues thereof and are bare and naked conclusions and speculative matter and facts that are not in any way related to the issues as set forth in the petition: "and supposing that the said engine had been uncoupled from said cars, so as to allow free movement of said car on said switch," "instead of uncoupling said engine from said cars," "was compelled to roll" "until" and "thus escaping death."

Whereof defendant prays judgment of the Court.

C. O. BLAKE,
R. J. ROBERTS,
EDWARD HOWELL,
Attorneys for Defendant.

Endorsed: #2114. Fred Ward v. Chicago, Rock Island & Pacific Ry. Co. Motion to Strike. Filed Apr. 8, 1914. W. K. Dunn, Clerk By C. C. F. Deputy. Filed by Leave of Court this April 8, 1914. George C. Abernathy Judge.

20 Thereafter and on the 18th day of April, 1914, the separate motion of the defendant A. J. Carney an- the defendant, The Chicago, Rock Island and Pacific Railway Company coming on for hearing, and after argument by the counsel of said motions of the said defendants they are by the Court sustained, to which action of the Court in sustaining the separate motions of the said defendants, exceptions are duly allowed to the plaintiff to each ruling of the Court.

21 Be it further remembered that subsequently and on the 28th day of April, 1914, the defendant, The Chicago, Rock Island and Pacific Railway Company filed its separate answer to the petition of the plaintiff herein, with the Clerk of said Court, which separate answer was in words and figures as follows, to-wit:

22 In the Superior Court in and for Pottawatomie County, State of Oklahoma.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY
and A. J. CARNEY, Defendants.

Answer.

Comes now the defendant, The Chicago, Rock Island and Pacific Railway Company, by its attorneys, the undersigned, and for answer to the petition of the plaintiff herein, denies each, all and singu-

lar the allegations contained therein except such as are hereinafter expressly admitted and expressly admits that it is a corporation organized and existing under the laws of the States of Illinois and Iowa, with its principal place of business in the City of Chicago, in said State of Illinois and doing business of an interstate common carrier with a line of railway running from said City of Chicago, in said State of Illinois, into and through the said State of Illinois and intervening states between it and the State of Oklahoma, and into and through the State of Oklahoma, and the County of Pottawatomie therein.

Second.

Further answering and for a separate defense this defendant avers that the injuries which plaintiff alleges in his amended petition were received by him, which are not admitted but expressly denied,

23 were not due to or proximately caused by any negligence or want of care on the part of this defendant or any of its servants, agents, officers or employees, but that said injuries as alleged, if any such were received by him, were directly due to and proximately caused by his own negligence and want of care.

Third.

Further answering and for a separate defense this defendant avers that the said plaintiff was at the time of his employment by this defendant, a man of mature years, experienced in the line of his vocation and knew and appreciated fully all of the risks and hazards of the work in which he was offering himself for employment and in which work he was employed by this defendant, that said work consisted of switching cars and breaking up trains and making up trains within the yard limits of this defendant company in the City of Shawnee, Oklahoma; that said work has not been changed, and the duties, risks and hazards of the same have not been changed, increased or diminished since the time at which the said plaintiff contracted with this defendant to do this work and since the time in accordance with which contract the plaintiff actually began said work; that the injuries complained of in the petition as amended herein, resulting as alleged, from plaintiff's falling "over in front of said car to the ground between the tracks of said roadbed," and caused as alleged, "by the defendant's negligence in failing through the said engine foreman to promptly uncouple said cars at said time." were proximately due to and proximately caused by the risks and hazards that are usual natural and necessary incidents to the service in which the said plaintiff was at the time engaged, namely: switch-

24 ing cars and making up and breaking up trains within the switching yards which said risks and hazards as previously alleged were well known to this plaintiff at the time he engaged in this employment with this defendant, and which said risks and hazards have not been since the time he began this employment and in which he was engaged at the time of the alleged accident

changed, increased or diminished, by reason of which said plaintiff is barred from maintaining this cause of action in this court at this time.

Fourth.

Further answering and for a separate defense, this defendant avers that if the plaintiff was injured as alleged in his petition as amended and if said defendant was negligent as alleged, which is admitted for the purpose of this plea only and otherwise denied, that said alleged negligence was not the proximate cause of his alleged injuries, but that said injuries if received, were directly due to and proximately caused by plaintiff's own contributory negligence in failing to use the care and prudence which an ordinary man, skilled in the line of his vocation would have used under the same or similar circumstances and in failing to use that degree of care which would have been used by an ordinary prudent man experienced as a switchman in the handling of cars, in failing to note the manner in which the cars were being handled and in failing to take the proper precaution for his safety when going from the middle to the rear of the car as he alleged and in stooping over to turn said brake, when he knew or by the exercise of ordinary care should have known that the cut of cars, upon one of which he was, would check naturally and that the said cut would be stopped in order to go forward with the switching movement in which they were then engaged and that said injuries if any such were received by him, were directly due to and proximately caused by his own contributory negligence and failure to use the degree of care which a man of ordinary prudence would have used under the same circumstances, by reason of which said fact, that said injuries were proximately due to and directly caused by the plaintiff's contributory negligence this defendant should be dismissed without day.

Wherefore having fully answered, this defendant prays to be dismissed with all its costs laid out and expended in this behalf.

EDWARD HOWELL,

C. O. BLAKE,

R. J. ROBERTS,

W. H. MOORE,

J. G. GAMBLE,

Attorneys for Defendant.

Endorsed: No. 2114. In Superior Court. Fred Ward vs. Chicago, Rock Island & Pacific Ry. Co. Answer. Filed Apr. 28, 1914. W. K. Dunn, Clerk Superior Court. By C. C. T. Deputy. It is agreed that within answer may be filed as of April 28, 1914. This Apr. 29, 1914. W. S. Pendleton, Att'y for P'tff.

26 Be it also remembered that on the same day, the 28th day of April, 1914, the defendant, A. J. Carney, filed his separate answer to the petition of the plaintiff herein with the clerk of said Court, which answer was in words and figures as follows, to-wit:

27 In the Superior Court of Pottawatomie County, State of Oklahoma.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and A. J. CARNEY, Defendants.

Answer.

Comes now the defendant, A. J. Carney by his attorneys the undersigned and for answer to the petition as amended, of the plaintiff herein, denies each, all and singular the allegations therein contained.

Wherefore having fully answered defendant prays to be dismissed with all his costs laid out and expended in this behalf.

EDWARD HOWELL,
C. O. BLAKE, *rjr.*,
Attorneys for Defendant.

Endorsed: No. 2114. In Superior Court. Fred Ward vs. Chicago, Rock Island & Pacific Ry. Co. Answer. Filed Apr. 28, 1914. W. K. Dunn, Clerk Superior Court. By C. C. F., Deputy. It is agreed that within answer may be filed as of April 28, 1914, this Apr. 29, 1914. Att'y for P'tff. W. S. Pendleton, Att'y for P'tff.

28 That thereafter on the 25th day of February, 1915, the above entitled cause having been previously assigned for trial, came on for trial in its regular order and the following proceedings were had in connection with the said cause, as shown by the stenographer's transcript of the testimony as taken and the introductory and connecting parts therewith.

In the Superior Court.

No. 2114.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND A. J. CARNEY, Defendants.

Transcript of Testimony.

SHAWNEE, OKLAHOMA, February 25, 1915.

Before Honorable Leander G. Pitman, Judge.

This cause coming on for hearing in its regular order, and both sides announcing ready for trial, the following proceedings were had, Messrs. Pendleton and Cutlip appearing for the plaintiff, and Messrs. R. J. Roberts, and Ed. Howell for the defendants.

Mr. Roberts: If the court please, we would like permission to withdraw our application for a continuance. The witness Mr. Carney, and whose absence was the basis for our motion, is present.

The Court: Defendants ask to withdraw their motion for a continuance and the exhibits attached thereto, and the permission is granted.

And thereupon a jury of twelve good and lawful men was duly called, examined, and accepted by both sides and sworn to try the case. And thereupon Mr. Pendleton made the opening statement to the jury for the plaintiff, and Mr. Howell made the opening statement for the defendant, whereupon the following witnesses were called and examined in the order following, and the following proceedings done and had.

30 FRED WARD, called as a witness in his own behalf, being first duly sworn, was examined in chief by Mr. Pendleton, and testified as follows:

Q. Mr. Ward, State your name to the stenographer.

A. Fred Ward.

Q. Where do you live?

A. Shawnee.

Q. How old are you?

A. Thirty-three past, thirty-three in December.

Q. Yes, sir. Were you on or about the 10th of December, 1913, working in the employment of the Rock Island Railway Company?

A. Yes, sir.

Q. In what capacity?

A. As switchman.

Q. Yard switchman?

A. Yes, sir.

Q. When did your duties require you to be working, night or day?

A. Well, I was on the extra board, I was liable to be working either way.

Q. Either way. Had you been previously working for the Rock Island Railroad Company, off and on?

A. Yes, sir.

Q. What experience have you as a workman working for the Rock Island Railroad, how long, about how long?

A. In what line?

Q. In different lines; how long have you worked for them in the railroad business.

A. During about three years as brakeman, nineteen months as conductor, and about two months and a half as switchman.

Q. Switched here in the yard. You were injured while switching here in the yards about the 10th of December, 1913?

A. Yes, sir.

Q. State who was the engine foreman at that time.

A. Mr. A. J. Carney.

Q. And who was the engineer?

A. William Russell.

31 Q. William Russell, and who was the foreman of that engine?

A. Fellow by the name of Sparks, C. W. Sparks.

Q. He is a witness?

A. Yes, sir. Sworn a minute ago.

Q. Anybody else?

A. Yes, sir; a helper by the name of W. H. Houk, and Henry McBroom, and a fellow by the name of Rowe, W. S. Rowe.

Q. Do you know where he is now?

A. No, Sir.

Q. Taken some interest to find him?

A. Yes, sir.

Q. By correspondence?

A. I had one letter from him, was working for the I. & G., San Antonio, he was living there then.

Q. He was living there then. Never have been able to find him since?

A. No, sir.

Q. Now, Mr. Ward, you have alleged in your petition that you were thrown from these cars on account of a jolt received when you were injured. You can state to the jury in your own way as accurately as you can the facts that occurred that night.

Mr. Roberts: We prefer to have that by question and answer, so as to give us an opportunity to object to it; and the narrative style is very objectionable.

The Court: The objection will be overruled unless it further develops that it is objectionable.

Q. Proceed.

A. You want me to state all the occasions that night from the time I went to work: this train No. 92 came in from the west, must have been sixty or seventy cars; they came down the main line, they have a north yard and a south yard; south of this main line track just before 92 came in from the west we got two cabooses off the caboose track, put one of them in on No. 8 track—

Q. Who were there?

32 A. This crew I was working with; Mr. Carney and his helpers. Put once caboose on No. 8, and one on No. 10.

Mr. Roberts: Wait a minute. We object to what was done with the caboose, incompetent, irrelevant and immaterial; prior to the time of the accident.

The Court: How long prior was it?

The Witness: That was connected with the making up of this train No. 92.

The Court: The objection will be overruled.

Mr. Roberts: Exception.

The Witness (resuming): 92 came in from the west on the main line. We taken what is known as the short stuff off the head end of 92, and shoved it in on Track No. 8.

Q. What is short stuff?

A. That is stuff, what is known as local stuff, some to stop here at Shawnee, and between here and the next division point.

Q. No through freight?

A. No through freight with this head end whatever. We shoved this in on that track No. 8, the other two switchmen did, and I and Mr. Carney, Mr. Carney says to me, he says, you come and go with me, Ward, while the boys puts this stuff away. I and Mr. Carney walked back side of this train No. 92 on the main line. He was checking his switch list and I was bleeding the air off. We got about eighteen or twenty cars, I didn't know the amount at that time. I was releasing the brakes. He says, cut right here. In the meantime the switch engine had come back from Eight and coupled onto this train on the main line. He says, cut right here.

Q. Who said that?

A. —I pulled the pin and he gave a back up signal.

Q. What capacity was Mr. Carney working in?

A. He was engine foreman.

33 Q. He was engine foreman, had control of the crew?

A. Yes, sir.

Q. All right. That is all.

A. He started up the ladder, and says, cut right here. He says, have you got them? I pulled the pin and says all right, he give a back up signal, and I went up on top of the box car.

Q. What does the back-up signal mean?

A. The engine was working in the forward motion, headed west, and it would have to back up to get on to No. 10.

Q. You were still on the west side of the hump?

A. Yes, sir.

Q. Yes, sir. Go ahead.

A. As the slack pulled away so I was sure they were out I got on top with him. I says How do they look? He pulled out his switch list and says Ten and the main line all the way. That is all that was said.

Q. What did he mean by that?

A. I presumed the way I taken it he was going to switch those cars—

Mr. Roberts: Wait a minute. We object to that as incompetent, irrelevant and immaterial.

The Court. Objection sustained.

Q. Well, you know, did you or not?

Mr. Roberts: Objected to as leading and suggestive.

Q. Is that a phrase in common use or not?

A. Yes, sir.

Q. Well, then, if the engine foreman should use that phrase in giving his commands it is—

Mr. Roberts: Objected to as leading and suggestive. This witness does not need leading.

The Court: It is somewhat leading.

Q. I believe you stated it was a phrase in common use, state whether you know what he meant by that.

34 A. Certainly I knew, because that is the only way he has got to give us our instructions. He meant he was going to switch a certain number of these cars to number 10, and a certain number back to the main line.

Q. All right. Go ahead now.

A. And that was all was said until we got up to where about switchman McBroom was standing. He hollered to Switchman McBroom, Line up for Ten. We pulled back over this point that the switch led off towards the main line, towards track Ten from the main line.

Q. There was a switch No. 10 did not connect directly with the main line.

A. No, sir. No. 10, connected with the lead.

Mr. Roberts: Objected to as leading and suggestive.

The Court: Yes.

Mr. Pendleton: I did not intend to be leading.

Q. You said you were on a switch leading to No. 10, I wanted to know whether No. 10, connected with the main line or there was a switch between them.

A. No. ten is connected with a lead leading from the main line, there is a bunch of tracks leading off, you first come to 6, 7, 8, 9,

10, 11, or twelve, but that is connected with the lead and the lead is connected with the main line.

Q. Now, Mr. Ward, at what point on the main line does this switch connect with reference to the hump, the highest point?

A. I should judge about 39 feet east of where the hump takes hold, or where the hump sets in, and as we pulled up over this with the bunch of 32 cars, I learned the amount we had after the accident, I didn't know prior to that, as we pulled up over this switch leading towards No. 10. Mr. Carney gets off the side of the car to the ground, right down to the switch, me remain on top of this 35 box car by this being my next ride to the field. He gets to the ground and commenced giving a proceed signal. He says, Do you see anyone down there? I says, Yes, some one on top with a lantern; The engine got around the curve. He says Give them the go ahead signal, I give it to the man on the car and the man on the car repeated it.

Q. What does that mean.

A. To begin to shove the cars ahead.

Q. You had been going east?

A. Yes, sir, and that reversed the position, we were going west. It meant to shove west because the engine was headed west.

Q. Had all the cars passed this lead switch.

A. All the cars had passed over this lead leading to Ten; they had passed east of that switch.

Q. And that switch had been turned.

A. Yes, sir, Mr. Carney threw the switch.

Q. All right.

A. And as this car got about over the switch leading towards No. 10, Carney says look out for them, Honey, I am going to hand you quite a bundle. I never seen or heard no more.

Q. Wait a minute, did he address that to you.

A. I don't know. I didn't see anyone else around there. I taken it for me, because I was the rider on the car.

Q. Yes. Go ahead.

A. And we shoved in around on the lead, around a kind of a curve behind a scale house and down until I knew we must have a pretty good bunch of cars, and it was necessary for me to get busy with my brakes in order to control them, and I knew from looking back.

Mr. Roberts: Just a minute, we object to the conclusions of the witness about what he knew.

The Court: Objection overruled, to what he states he knew as a fact.

36 Mr. Howell: He states as a reason for his action, the reason for his action was incompetent.

The Court: The reason for the action, but he can state as a fact what he knew, how many cars were in there and what he knew of the condition.

A. What is the——. The amount of cars I had in there I knew this one brake wasn't going to hold them.

Mr. Roberts: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Roberts: Exception.

A. And seeing no signal from this other rider or Mr. Carney either or no lamp whatever, I could not see any lamp. The engine ceased to exhaust, shut off, rather, I stepped immediately to this brake to set it, this first brake.

Q. Yes, what brake was that.

A. The first brake on the west end of the car I were on. I stepped about ten feet over the running board to the brake—

Q. Was that the last car of that bunch?

A. Yes, sir—with the intentions of setting that brake, and stepping back and getting another one to the next car. About the time I got over to brake, just had stooped to the brake, and taken the slack out of the chain. We use what is known as a brake stick—pick handle about that long—I had just shoved that in the wheel. Brake staff is only about six inches above the top of the car. I think, about six or seven. It wasn't over 7 inches above the top of the car—

Q. Mr. Ward, Stand up and show the position you would be in.

A. I stood stooped right in this position. I would have to get down, and I had just taken the slack out of this chain, just 37 had stuck the stick in and the slack went out, and I fell forward.

Q. Head first.

A. I had one hand next to the brake, I caught with that hand and that kind of checked the fall, as I did that I went down with my feet first, and my foot stuck between the guard rail, and the rail about No. 9 switch.

Q. That was the lead switch to No. 9?

A. Yes, sir, and the draw bar struck me in the hip and knocked me down; as it did it wrenched my foot loose and knocked me between the rails and the cars coming one me, I rolled perhaps as far as across this court room on the rails.

Q. Right foot or left.

A. Left foot. The guard rail stands about three inches down between the guard rail and the outside rail, something like that (indicating), and it went between the rails just that way.

Q. Yes. Weight pushed it down?

A. Yes, sir, it went right down between the two rails.

Q. The draw bar struck you before you got your foot out or feet?

A. The draw bar knocked my foot out.

Q. Struck you on the hip.

A. On the hip joint. Knocked me down between the rails, and me pushing myself away from the car I outrolled it and rolled over the north rail.

Q. How far did you roll down.

A. I must have rolled from here to that banister; two thirds of a car length.

Q. Just over and over?

A. Yes, sir.

Q. How near did the car come to you as you went over?

38 A. Why, I had on a pair of overalls over a pair of pants; cut them down across that way, and cut my jumper across here, bruised my hand up here as I taken hold of the flange of the wheel; the last thing I taken hold of was up over the wheel as I pulled myself out on the north side; the brake stick fell on the track and it run over it.

Q. Mr. Ward, what was the cause of your falling from there?

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness.

The Court: Objection sustained.

Q. You can state—you may state how you happened to fall.

The Court: He did.

Mr. Roberts: He has told that.

Mr. Pendleton: That is what I mean, the immediate cause, not further back, you say it was the jolt the car gave, a jerk or jolt there?

A. Yes, sir.

Q. Well, you as a switchman know what made that jolt; how it happened to be made.

A. By the stopping of the engine and failure to cut it off.

Q. Failure to cut off the engine and the slack taking up.

Mr. Roberts: We object to that as leading and suggestive, and repetition.

The Court: Overruled. It is somewhat leading.

Q. Well, then, when the engine stops how is that motion passed on.

A. From car to ear.

Q. From car to ear?

A. Yes, sir; until it gets to the rear.

Q. What is that called, taking up the slack?

A. We call that slack running out.

Q. You call that slack running out instead of taking up the slack.

A. We call that slack running out. Yes, sir.

39 Q. And that passed on from car to ear and finally passed to your ear?

A. Yes, sir.

Mr. Roberts: Objected to as leading and suggestive. I beg the Court's pardon for continually interposing that objection, but I do not think it is quite fair for counsel to so lead his own witness.

The Court: Overruled. Don't ask any more leading questions.

Mr. Pendleton: I will try to do this. I do not wish to violate—

The Court: No, sir, I know you do not.

Q. I want to explain this, what it seems to me is explanatory

connecting up the main questions. On the material questions I do not wish to lead.

The Court: Proceed.

The Witness: What was the question.

Q. Now, Mr. Ward, you can state what is the rule in switching about uncoupling the cars and stopping the engine.

Mr. Roberts: We object to that as incompetent, irrelevant and immaterial, and not the best evidence.

The Court: That objection will be sustained. You have not qualified him.

Mr. Pendleton: Probably that is right.

Q. Did the company have any rules with reference to switching there, what sort of signals to give.

A. Why, the company has six lamp signals; they have a signal they instruct you on.

Q. They have a book of rules? system?

A. Yes, sir.

Q. What do the rules require with reference to signals?

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, not the best evidence, not within the issues in this case.

The Court: Objection sustained.

Mr. Pendleton: Exception.

40 Q. I will ask you to look, Wait now what do the rules require, you are acquainted with those rules, are you?

A. Yes, sir.

Q. What do the rules require with reference to signals.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial. Not the best evidence, and not within the issues in this case.

The Court: Objection sustained.

Mr. Pendleton: Exception.

Q. I will ask you to look at that, and see whether or not that is the book of the company?

A. Yes, sir, that is the Rock Island book of rules taking effect April 1, 1910; that is the last book.

Q. They operate under those rules, do they?

A. Yes, sir.

Q. You can state whether—

Mr. Roberts: Have it identified, please.

And thereupon the book is marked Exhibit A on page 10 thereof.

Q. You can state whether there are any signals shown in this book, any signal shown in this book to what they call a slow-up signal or easy signal.

Mr. Roberts: We object to that for the reason the rules are the best evidence.

The Court: Objection sustained.

The Court: Call his attention to each rule you want. Were those rules in force—

Mr. Pendleton: He said since 1910.

The Court: He said 1910. Were they the ones in force when you were injured?

Q. Take that book and point out what signals—

A. Signals, they have them, four of these used in switching in yard service; only four used.

Q. Read them.

41 A. What is known as the stop signal: that is a lamp swung across the track.

Mr. Roberts: We object to the witness explaining. The rules are in evidence.

The Court: They haven't been introduced, but the objection will perhaps have to be sustained at this time. You haven't the rules in evidence.

Mr. Pendleton: No, sir; I haven't the rules in evidence.

The Court: They are the best evidence.

Mr. Pendleton: Then the witness says the rules are practically in force.

Mr. Roberts: You have no—

The Court: Consider the book in evidence.

Q. Now then state from those rules what signal was a proper signal in the case in point when you were on that car and this bunch was being cut off to you. What was the proper signal there.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, being an explanation of the rules which speak for themselves, and calling for a conclusion of this witness.

The Court: Objection overruled.

Mr. Roberts: Exception. —and not within the issues in the case.

A. The proper signal was given to proceed, and he should have proceeded until they cut off, cut, and then give the stop signal to the rear end of the train, his portion.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, a conclusion and interpretation of the rules, and not within the issues of the case.

The Court: Objection will be sustained.

The Court: —.

42 Mr. Roberts: I would like to have the jury instructed to disregard the evidence.

Mr. Pendleton: We except to that.

Mr. Roberts: Will the court so instruct the jury.

The Court: The jury will disregard any statement the witness made as to his conclusions as to what the rules show, the court holding that the rules themselves are the best evidence, and they may be read in evidence and the jury will draw their own conclusions.

Mr. Pendleton: Our position is as to this particular language—

Mr. Roberts: We object to your position if it is not in accordance with the holding of the court.

Mr. Pendleton: Our position is the witness has stated merely his application—

The Court: That question has been ruled on.

Q. Now then, Mr. Ward, I wish you would illustrate to the jury what that stop signal is, from the book, show the book.

Mr. Roberts: The book itself illustrates it.

The Court: Objection overruled, Proceed.

A. The stop signal—

Mr. Roberts: Just a minute, let me show the book to the court.

The Court: The court is fairly familiar with those rules.

Mr. Roberts: Note an exception.

Q. Illustrate to the jury from that book what that stop signal is.

A. The stop signal is a lamp swung at arms' length across the track that way, or along the track like that.

Q. Yes, that is all.

Mr. Roberts: We move to have the jury instructed that any explanation and interpretation or representation of the signal by the plaintiff and the witness before them is incompetent, and to be disregarded by them for the reason the rules themselves are the best evidence.

43 The Court: Overruled.

Mr. Roberts: Note an exception.

The Court: The rules are the best evidence, but an illustration of them by an employee as they were practically used at that time the court holds to be proper.

Q. What is the proceed signal.

A. Lamp raised and lowered that way in front of you.

Q. Now, if I remember right you stated a while ago the proceed signal was given?

A. Yes, sir.

Q. That proceed signal was after the cars—was—after the cars—the whole train had passed over east of the switch?

Mr. Roberts: Objected to as repetition.

The Court: It is leading too, and suggestive.

Mr. Pendleton: I am doing it for brevity. It is proved—that. What is the use of objecting.

Mr. Roberts: Objection is made.

Q. Where was that—when the proceed signal was given, where were the cars, which side of the hump?

A. They were east of the hump.

Q. They were east of the hump. Yes. The proceed signal, then, what does that mean, which way do they go.

A. Shove forwards, by the engine being headed west.

Q. Shove the whole train.

A. Shove the whole train. Yes, sir, forward, west.

Mr. Roberts: Objected to as leading and suggestive.

The Court: Objection overruled.

Mr. Roberts: Exception.

The Court: Proceed. Don't ask any more leading questions.

Mr. Pendleton: Your Honor, I am trying not to lead, and under the Court's own ruling it was not leading.

The Court: Go ahead.

44 Q. Well, the proceed signal was given. Which direction did the cars take?

A. They started to move west.

Q. And when was the next signal? What is the next signal, now, to be given?

A. Stop signal.

Q. Stop signal. Yes. Do you know of any other signal to be given in such cases as that?

A. No, sir.

Mr. Roberts: We object to that as incompetent, irrelevant and immaterial. If the court please, anything than what did actually happen.

The Court: Answer that question by yes or no.

Mr. Pendleton: He said he did not.

The Court: Objection overruled.

Mr. Roberts: Exception.

Q. Now then, Mr. Ward, how long did you say you had been working for the company in that capacity as switchman?

A. In the yard capacity?

Q. Yes.

A. I went to work up there for them the 16th of October, the night of the 16th of October rather, of the same year, 1913.

Q. About two months and a half?

A. Not quite two months, Judge.

Q. Not quite two months. Mr. Ward, you may take this book and show how many signals all together are given for switching purposes.

Mr. Roberts: Object to that; the rules are the best evidence.

Mr. Cutlip: Point out the rules.

Mr. Roberts: The entire rules have been offered in evidence.

The Court: That objection is sustained.

45 Mr. Pendleton: Very well.

Q. Now, Mr. Ward, when a train proceed signal has been given and the engine starts with the train pushing the train backwards, what occurs with reference to the cars; how do they do?

Mr. Roberts: We object to what occurs generally, and insist on it being limited to this particular case.

The Court: Objection overruled.

A. I don't know as I exactly understand the question.

Q. Do the cars jump together or pull apart.

Mr. Roberts: Objected to as leading and suggestive.

The Court: That is not leading. It is put in the alternative. Objection will be overruled.

Mr. Roberts: We except.

Q. Did the cars jump together?

The Court: Now you are leading.

A. Certainly, the slack shoves together all up in a bunch.

Q. Now, when the cars are uncoupled what condition must the train be in when you can uncouple the cars.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Roberts: Exception.

A. When you get the slack, when the slack is all shoved together.

Q. You can uncouple the cars then?

A. Yes, sir.

Q. When the engine—when the cars are being pulled, and the slack is taken out, let out, can you uncouple the cars then?

A. No, sir.

Q. It is fast. Well, when the cars are in motion under this proceed signal *under this proceed signal*, and passing down the switch, starting down the switch as you mention, if the engine ceases to 46 exhaust, if the stop signal, or even the easy signal is given; if the stop signal is given—strike out that easy—what effect will that have on the slack between the cars.

A. Why, when the last cars runs out the *the* slack will rebound on the draft bumpers.

Q. How long does that rebound last.

A. It is done that quick.

Q. After this impulse passes after the stop signal is given and the engine stops or ceases to exhaust, then is it easy or difficult to get in and out to uncouple.

A. No, sir, If a man can cut when this rebound comes back.

Q. Can he cut it any other time?

A. No, sir.

Mr. Roberts: Objected to as leading and suggestive.

The Court: Overruled.

Mr. Roberts: Exception.

Q. Now then, Mr. Ward, when is the proper time to cut cars, when you are switching back your cars, when is the proper time to cut a bunch of cars like that, is it before the stop signal is given or after.

A. Before it is given is the proper time to cut them off.

Q. You may state whether or not it is safe to give the signal and try to cut them afterwards.

Mr. Roberts: Just a minute. We object to that as incompetent, irrelevant and immaterial, calling for a conclusion.

The Court: Objection sustained.

Q. After the signal is given and the checking process has passed where the cut is to be made, how long did you say it was, the instant when they could pull out the pin.

A. Just the moment the rebound comes back and the slack, a man can pull the pin.

Q. Can they do it afterwards?

A. No, sir, because the slack runs back again.

47 Q. Does it take quick action?

A. Yes, sir.

Mr. Roberts: Objected to as leading and suggestive.

The Court: Sustained.

Mr. Pendleton: Exception.

Q. State whether or not it takes quick action to take the pin out and uncouple the cars after the stop signal is given.

A. Yes, sir, it does.

Q. As an expert and as a switchman, I will ask you to state whether or not it is safe to risk it and wait until after the stop signal is given.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial invading the province of the jury and calling for a conclusion.

The Court: Overruled.

Mr. Roberts: Exception.

A. No, sir, it is destructive to the property, and it is dangerous to life and limb.

Mr. Roberts: Move to strike out on the ground that it is not within the province of this witness to know, a conclusion and invading the province of the jury, and the witness is not properly qualified to offer expert testimony and the matter is not a subject of expert testimony.

The Court: Overruled.

Mr. Roberts: Note an exception.

Q. Mr. Ward. Mr. Ward, did you ever have any similar experience like that under Mr. Carney, when you worked for him there?

A. No, sir.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Roberts: Exception—not within the issues. Exception.

Q. Did you know of any rule or custom of the company, or special rule or custom; do you know of any rule or custom by which they slow up cars that way?

48 Mr. Roberts: Just a minute. Objected to as incompetent, irrelevant and immaterial. No custom pleaded, not within the issues of this case, incompetent.

The Court: Objection will be overruled at this time.

Mr. Roberts: Exception. May I ask the court upon what ground?

The Court: On the ground he has already answered it. Awhile ago he said he didn't know of any.

Mr. Pendleton: They have alleged it was a custom and his duty and he knew it.

The Court: I would be entirely incompetent at this time. It might be proper on rebuttal.

Mr. Pendleton: They haven't objected on that ground. It might appear I think, especially as they have alleged it.

The Court: Proceed.

Q. When you were on the car before you started towards the brakes where were you, what part of the car.

A. Standing back about the middle of the car; that would give me about fifteen or sixteen feet from the end.

Q. When you went, as you have stated, to take hold of this brake for the purpose of setting it and slowing up the cars did you anticipate that they were taking up the slack or letting out his slack.

Mr. Roberts: Objected to as leading and suggestive.

The Court: Objection sustained.

Q. You didn't know that was coming?

The Court: Overruled. If you will wait. Answer the question just before.

A. What was the question.

Q. You didn't know that was coming?

A. No, if I had I never would have left the middle of the car.

49 Mr. Roberts: We move to strike the last part of the answer as a conclusion of the witness, and not responsive.

The Court: The part of the answer in which the witness states that if he had he would never have left the middle of the car, will be stricken, the other part will be permitted to remain.

Q. Mr. Ward, you can state as a switchman what the effect of a jolt of that sort has to a switchman upon a car, as violent as it was at that time to you.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion.

The Court: Objection overruled.

Mr. Roberts: Exception.

A. Why, if a man was in the middle of the car and knew it was coming, the chances are he could stay on his feet.

Mr. Roberts: Move to strike as not responsive to the question and including elements not in the question.

The Court: Overruled.

Mr. Roberts: Exception.

Q. If he did not know it was coming?

A. It would knock him down.

Q. It would knock him down.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, stating facts not within the issues in this case.

The Court: Objection overruled.

Mr. Roberts: Exception.

Q. Mr. Ward, where were you; that is, the car you were on at the time when this stop signal—or rather when this engine ceased to exhaust that you have mentioned in the testimony?

A. Where were I?

Q. Yes, where was your car, the one you were on.

50 A. About ten or twelve car lengths inside after we left *left* the main line towards No. 10.

Q. On this lead switch. Yes. And how far from this grade; hump?

A. About ten or twelve car lengths.

Q. Yes. Had your cars been cut at the time when that signal was given. When that stop signal was given and then the engine ceased to exhaust.

A. I don't think they were or I would not have been knocked off of there.

Mr. Roberts: Move to strike that out as being a conclusion of the witness.

The Court: Sustained.

Mr. Roberts: Just a moment, we would like to have the jury instructed to disregard the voluntary statement of the witness.

The Court: Read the question and answer.

(Record read from "Yes, had your cars been cut etc.)

The Court: The jury will be instructed to disregard the voluntary statement, I would not have been knocked off of there. But the first part of that answer is competent, and may remain.

Q. Well, if the cars had been cut before the stop signal was given or before the engine ceased to exhaust, would this jerking motion have passed on?

A. No, sir.

Mr. Roberts: Just a minute please. Mr. Witness, will you wait. Objected to as incompetent, irrelevant and immaterial and calling for a conclusion.

Mr. Pendleton: He is an expert.

The Court: The objection will be overruled and the jury will be instructed that that answer is only permitted to go to the jury in the light of his experience, if any has been shown, and will be given such weight as the jury think it is entitled to under the qualification that has been developed through the examination of this witness as an experienced railroad man.

51 Mr. Roberts: An exception to the ruling of the court.

Q. Now, Mr. Ward, when you rolled out off of that track what did you do.

A. I got up and started to walk across to the car repairer's shanty.

Q. Go ahead.

A. Of course the next track, I crossed the next track and had to lay down; sunk down, just sunk down and was laying on my face on the ground and the car repainer came and picked me up.

Q. Who was he?

A. Frank March.

Q. You can state what condition your foot was in.

A. Why this left foot was twisted, the sole of the foot was practically around where the side of it is, practically around, out of shape.

Q. Could you stand on it or walk on it?

A. No, sir.

Q. Was your hip hurt or not?

A. Hurt, hip was hurt then.

Mr. Roberts: Objected to as leading and suggestive.

The Court: Overruled. Describe the injury to your hip, if any.

A. Yes, sir, my hip was hurt; that leg from the hip down was paralyzed; was useless.

Q. At the time?

A. Yes, sir.

Mr. Roberts: We move to strike his conclusion which is incompetent.

The Court: Motion overruled.

Mr. Roberts: Exception.

Q. Did you go to any—were you taken to any doctor's office or any house that night?

52 A. They taken me over to the car repairers'—what we call the car repairers' shack and phoned and Dr. Blickensderfer came over and took me home.

Q. That was on the grounds?

A. Yes, sir, on the north side of the—

Q. I don't know whether you stated whether this was night or day.

A. It occurred about 9:30; I didn't have a watch with me.

Q. Day or night?

A. Night.

Q. Yes, sir between 9:30 at night, and Dr. Blickensderfer dressed the foot, did he?

A. Yes, sir.

Q. What did he do to it.

A. That night when he came up to the switch shanty he had me stand up, and he worked with this joint a while on the hip, and he—I had the shoe and stocking off, sock off, and he bandaged that from the end of the toes clear around here up to the knee, and put some linament on it, and that remained there that night. The next morning he came down to my rooms where I was rooming at, and redressed it, and pulled that bandage tighter and it stayed until the 26th.

Q. Of December?

A. Yes, sir.

Q. That was on the night of the 10th this injury occurred?

A. Yes, sir.

Q. Then what did he do.

A. He never came down any more; I sent after him a time or two, and never could catch him; on the evening of the 26th I got on the crutches and went to his office.

Q. What was the first time you got out of your room after the injury.

A. The evening of the 26th.

Q. State what occurred.

A. I met a fellow at the foot of the steps, and asked him if Dr. Blickensderfer was in, and he said, yes; and I went up to 53 his office and told him I wanted him to do something for that foot, it was paining and still swollen. He said, come back in here, and he taken me —

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained. Just state what he did.

Q. Just a moment, who was Dr. Blickensderfer?

A. Company doctor.

Q. Company physician, regularly employed?

A. Yes, sir.

Mr. Pendleton: I think it would be competent.

Q. State what was said between you and the doctor.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Roberts: Exception.

A. He called me back in the room and I sat down on his kind of a chair he has to do his operating on; pulled the shoe off, or rather he did, I didn't have any shoe on, I had an overshoe; he taken off the overshoe and the sock off and then the bandage off, and he said, set your foot down, let's see. He says, put your foot down flat, as I set it down then. He says, what is the matter with it, it don't come down, set them flat. I set them flat, this one came in like that. He looked at it a minute or two and says, I have neglected that foot, I didn't think it was half that bad.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Roberts: Move that the jury be instructed to disregard it.

The Court: The jury will disregard the part of the witness's statement as to what Dr. Blickensderfer said and about how he treated the limb.

54 Q. Well, Mr. Ward, you can state what was done to your foot by Dr. Blickensderfer there.

A. Well, sir, he took hold of the foot and examined it, and said, Grit your teeth, this is going to hurt like hell. He took hold of the foot. He says, I have got to pull that back. He taken the foot, caught hold of it in here. He taken the foot and pulled it as far as he could the other way, and up this way, and taken about inch adhesive plaster and commenced to bind this way to the toes, pulling back this way as far as he could to the knee. He says, you let that stay there a couple of weeks. And that is the treatment he give it up to June, the fore part of May, about the middle of May.

Q. How often did he treat it that way?

A. Every week or ten days.

Q. Were you able to get around any?

A. I got around on the crutches, about two months, I used the crutches about two months.

Q. Two months?

A. Yes, sir.

Q. And after that you were able to go along without crutches?

A. Yes, I discarded the crutches along in April, sometime the latter part of April.

Q. Did Dr. Blickensderfer have any other physicians to help him?

A. Yes, sir, he had two others.

Q. Who were they?

A. Dr. Rice and Dr. Carson.

Q. Did they make an examination also?

A. Yes, sir, I think Rice made his along about the 14th or 15th of February. I was standing in front of the pool hall one day and —

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained at this time.

55 Q. 14th of February was next year?

A. 1914. Yes, sir.

Q. Well, Mr. Ward, you can state to the jury whether your foot has ever got well yet.

A. No, sir, never has.

Q. State whether you are able to bear much weight on that foot now, as much as you could before?

A. Can't bear any weight at all on the entire foot, use the heel a little and the outside of the foot.

Q. Do you use any brace?

A. Yes, sir, a steel truss in there.

Q. In the shoe?

A. Yes.

Q. Who furnished you that?

A. Doe Blickensderfer at the time he furnished this plaster and pulled the foot back as I was telling you about it.

Q. Do you wear it yet?

A. Yes, sir.

Q. Are you able to get along without it?

A. No, sir.

Q. Now, Mr. Ward, I believe right now I will get you to take off your shoe and show that foot to the jury.

A. Both of them?

Q. Yes, you had better take off both.

(Witness removes shoes and socks.)

Q. Let's see that foot now.

Mr. Cutlip: Let the record show he is asked to see the brace referred to a few minutes ago in his testimony.

Q. Let's see that plate now.

(A. Witness produces brace.)

Mr. Pendleton: I will ask to have that marked Exhibit B.

The Court: Any objection to that at all.

The Court: Exhibit B introduced in evidence.

Mr. Cutlip: With permission.

The Court: The Court will pass on that later.

56 Mr. Cutlip: What is Exhibit B, Mr. Ward.

A. Plate, steel plate, steel brace, worn on my foot in the shoe.

Mr. Pendleton:

Q. That you stated a moment ago was given to you by Dr. Blickensderfer.

A. That was given to me by Dr. Blickensderfer, yes, sir. That is the way it is worn (indicating). Worn right that way.

Q. Now, Mr. Ward, without that brace, you can state whether you can bear your weight on your foot?

A. No, sir.

Q. Stand on it.

A. Now (demonstrating) there is where I get my weight over just exactly in that position. (Illustrating.)

Mr. Cutlip: State what you mean by "there is where I get my weight exactly in that position."

A. On the out edge of this foot and on the heel.

Q. Out edge of the left foot?

A. Yes, sir.

Q. And the heel?

A. And the heel.

Q. Now, in walking you state what part of the foot you have to bear your weight on.

A. Just as it sets. (Indicating.) I had got to take it up and bear it down that way.

Q. You can't bear your weight on the inside of the foot?

A. No, sir.

Mr. Roberts: I would like for the witness at this time to stand on the right foot in the same manner in which he stands on the left. (Witness illustrates.)

Mr. Roberts: That is not the way.

A. I can't stand on the right foot that way at all.

Mr. Roberts: All right.

Q. Now, Mr. Ward, show the jury both feet, and say if there is any difference, state to the jury whether there is any difference.

57 Mr. Roberts: Objected to—

The Court: Objection sustained, the jury can say from the examination whether there is any difference.

Q. Show the bottom of your feet.

The Court: The jury have the right to examine the feet from any angle.

Mr. Howell: Do you want to offer that shoe in evidence (meaning the plate)? We don't think it is necessary.

Mr. Roberts: Don't put the plate back.

A. Won't you let me wear it home.

The Court: Mr. Ward, keep still, don't be arguing back and forth.

Mr. Pendleton: Counsel told you, Mr. Ward, not to put the plate back.

The Court: I told counsel to sit down. Put on your shoe, if you want to and go back to the stand.

Mr. Pendleton: Will the court permit him to put the plate in the shoe?

The Court: Yes, permission is given for the plaintiff to withdraw Exhibit B.

The Court: Proceed, Gentlemen.

Mr. Roberts: We want to except to the withdrawal of Exhibit B from the record. It is a part of the evidence in the case and we object to the withdrawal.

Mr. Pendleton: We will not insist on it permanently. Counsel can have it whenever they wish.

The Court: Take counsel's statement that they will not withdraw it permanently that counsel for defendant can have it when they want it.

Mr. Pendleton: Yes, sir; just for convenience.

Q. Now, Mr. Ward, how about your hip, has that about gotten well?

58 A. No, sir. The hip the hip has bothered me always.

Judge, ever since it has been hurt, especially when I am on it to amount to anything.

Q. What?

A. Well, when I am on it, when I am walking.

Q. Did they make an examination of your hip at the time, the physicians?

A. Dr. Carson and Doc Bickensderfer did, yes, sir.

Q. State whether or not Dr. Carson made a personal examination in my presence when I was there with you, of your hip?

A. Yes, sir.

Q. When Dr. Carson was examining your hip, is it Dr. Carson that you mentioned a while ago, he was one of the attorneys, physicians, I mean, assisting Dr. Blickensderfer?

A. Doc Blickensderfer, yes, sir, he called him in.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, witness has not shown that he knows.

The Court: That objection will be sustained.

Mr. Pendleton: Exception.

Q. When Dr. Carson was examining the hip was he taking any notes or not?

A. Yes, sir.

Q. If he made any remark about the condition you may state what he said.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, in no way binding on this defendant.

The Court: Objection sustained.

Mr. Pendleton: Exception.

Mr. Cutlip: If Dr. Carson was a physician of the company.

The Court: The court holds if Dr. Carson was or was not. Here is the physician, Dr. Carson he is here and can be placed on the stand, and if he makes a statement as to what the facts were then this witness can rebut it if necessary.

Mr. Pendleton: Did you note our exception to the court's 59 ruling there.

Q. Mr. Ward, as a switchman you can state what you were earning before you were injured.

A. The job I was on paid without any over time \$111.00 a month, straight ten hours' work, and we were making 12 and 15 hours every night, that is from two to three hours over time.

Q. You state how much you were making.

A. About \$111.00 a month for 30 day month.

A. You got so much by the hour.

A. The night job paid about 37 cents an hour, and the day 36.

Q. Well are you now, Mr Ward, able to work in the same capacity any more as switchman?

A. No, sir.

Mr. Roberts: Objected to on the ground of repetition.

The Court: Objection overruled.

Mr. Roberts: Exception.

The Court: Go ahead.

Q. You can state whether or not that business of switchman or a yard switchman furnishes for skillfull men nearly always an occupation or not.

Mr. Roberts: Objected to as calling for a conclusion, incompetent, irrelevant and immaterial.

Mr. Pendleton: Whether it is overcrowded or not.

Mr. Roberts: Same objection.

The Court: Objection will be sustained.

Mr. Pendleton: We except to that; we have alleged that this is a business that has not so much competition in it and that he has lost it, as a part of his damages.

The Court: Proceed.

Mr. Pendleton: Note an exception always, when we except, when we object.

60 Q. Have you been able to find any occupation, steady occupation since you were hurt?

Mr. Roberts: We object to that as calling for a conclusion of the witness, incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Roberts: Exception. If the Court please, may I suggest this: it seems to me the proper question was whether he had done any work, not whether he could find any.

The Court: That is practically what he does ask him.

Mr. Roberts: It is the form of the question. I do not object to what he did. But I do object to whether he could find—

The Court: The proper question would be to ask him his physical condition as to his ability to work, and then what his conditions have been. Objection overruled.

Q. Have you made efforts since that time to get work?

A. Yes, sir.

Q. What work have you been able to find to do?

A. Well I drove team for Leslie & Dennison feed company at Wilson, I went down to work for them, and worked a couple of weeks, and give the job back, unloading feed, because I couldn't do the work.

Q. Why couldn't you do the work.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Roberts: Exception.

A. Conditions would not permit; my foot and hip would not let me do the work.

Q. What was the matter, the work too heavy for you to do?

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

61 Q. On account of your foot and hip you can state whether or not in that business you had any heavy loads to lift.

A. That business, heavy sacks to handle, weigh 100 to 160 pounds.

3—Rec.

Q. Found they were too heavy for you to handle?

A. Yes, sir.

Q. How were you, Mr. Ward, before you were injured as to strength and ability to handle—

A. I used to work east of Haileyville, and could take a barrel of beer, and carry a barrel of beer across the track to the platform, they weigh 140 or 50 pounds.

Q. Can you lift such weights as that now.

A. No, sir, I could not begin to lift them.

Q. Mr. Ward, you can state whether or not this injury gave you pain, and if so, how much.

A. There hasn't been a day or night since I was injured that it has not bothered me.

Q. I mean at the beginning.

A. Oh, a great deal of pain, pained me constantly for two months.

Q. A great deal of pain?

A. Yes, sir.

Q. And you still suffer pain occasionally now.

A. Well, any time I am walking around on the foot it will bother me, sometimes wakes me in the night, wakes me up during the night, any bad weather will affect me.

Q. Have you had physicians examine it lately?

A. Yes, sir, I had three in the last day or two, couple of days.

Q. In the examination, the physicians feeling of it, did you feel any pain then?

A. Yes, sir.

Q. That will do.

Take the witness.

62 Cross-examination by Mr. Roberts:

Q. The work on the night of the accident was breaking up train 92, you say?

A. Yes, sir.

Q. The train had come in from the west and was going eastward on the main line of the switchyard in Shawnee, was it?

A. Headed eastward.

Q. Where it entered the yard?

A. Yes, sir, it came in from the west, the engine was going east.

Q. The engine had been cut off when you began the business of breaking up the cars of the train?

A. Yes, sir.

Q. How many tracks are there south of the main track on which this train No. 92 was, was standing after the engine had been taken off and way?

A. How many on the south side?

Q. Yes.

A. What is the number? From 6 to 12, 13 a kind of a track runs up—

Q. 6, 7, 8, 9, 10, 11, and 12?

A. Yes, sir.

Q. And the old track 13. The caboose, you say that was the beginning of the train you were making up was on track No. 10.

A. There was two 92, '3, one was on 8 and one was on 10.

Q. The one you were working on at the time of this accident was making up on No. 10, was it?

A. Yes, sir.

Q. And that was the track four or five tracks south of the main line.

A. That would be the fourth track. Six and four is ten.

Q. How much of the cars, how many of the cars, or how much of the train, of train No. 92 had been taken off before you started this cut of 22 cars at the time of the accident?

A. I could not tell you.

Q. Could you tell the proportion, a third or fourth.

A. I should judge these 22 was about the middle of 92 that came in from the west.

63 Q. Do you know where any of these cars were destined to.

A. No, sir.

Q. Don't know anything about the contents?

A. No, sir.

Q. The slope of the yard then from the place where you got these 22 cars is gradually up grade to this hump or divide?

A. It is up grade to that lead switch.

Q. Where the hump occurs?

A. Yes, sir.

Q. And then down grade slightly to the eastward from that?

A. Yes, sir.

Q. Is that what they call a gravity yard, or do you know.

A. Well now there is a distinction between a gravity yard and a hump yard, it is not what you would call a hump yard or a gravity yard.

Q. It is a yard which slopes both ways from this hump which is the highest point in the yard, so the cars will roll either way.

A. Yes, sir, this hump—

Q. This hump, then, occurs about at the point where the diagonal switch goes off or comes off the main line, is that right.

A. I think the hump commences a car length east of that, Mr. Roberts, somewhere near.

Q. I misunderstood you a while ago. I thought you said a car length west of the place where the lead comes onto the main line.

A. The question was the switch was east about a car length west of where the hump commences.

Q. I am trying to get the positions; if I misunderstood you I would like to have you correct it?

A. Yes, sir.

Q. Then this train, this engine was headed in your direction?

64 A. The switch engine?

Q. The one you were working with?

A. It was headed west.

Q. Headed westward?

A. Yes, sir.

Q. And backing up at the time of the injury. It had to go westward then, and push against the train couple onto the 22 cars and started backward with the 22 cars—

A. Yes, sir.

Q. Had gone eastward until it came just beyond the place where the switch was which takes them off on to this branch track leading to 10, and then it came to a stop.

A. Yes, sir.

Q. There was nothing unusual in the movement up to that point?

A. No, sir, nothing whatever.

Q. Customary and usual movement of handling cars?

A. Yes, sir.

Q. And the movement of the cars there ready for the switch to be thrown going down onto the branch which leads to 10. Where were you at the time, Mr. Ward?

A. At the time that switch was thrown?

Q. Yes, or at the time the train was stopped.

A. Standing right on top of the box car about the middle.

Q. Mr. Carney was where?

A. He was on the ground.

Q. How far from you?

A. From the top of this car down—he had got down to throw the switch.

Q. Right beside you?

A. Yes, sir.

Q. And there was someone else on the cars giving signals to the engineer from you?

A. On the east end.

Q. Who was he?

A. I could not tell you. I was informed afterwards it was Mr. Houk.

Q. He was near the front end of the 22 cars?

A. Yes, sir.

65 Q. And the only man you could see to transmit signals to.

A. I could see Carney where he was on the ground.

Q. The man to whom your signals were transmitted for the engineer was this man Houk up here or whoever it was.

A. The lamp was up near the engine, sir.

Q. Mr. Carney gave a signal?

A. Mr. Carney gave a signal, give a proceed signal. He says, You see? And I says, yes, he has got it, and about that time the man on the car below answered the signal.

Q. That signal was given by Carney to you, and you transmitted it to Houck, and he again to you that he had it, and was transmitted by him to the engineer.

A. I could not tell you whether Houck saw Carney's signal or not. We both give the signal; he was on the ground and I was on top of the car. He says, do you see? I says, yes, he's got it. We were both giving the signals.

Q. What do you mean by he has got it.

A. He answered the signal.

Q. Whether he got it from you or Carney, he had understood the signal?

A. Yes, sir.

Q. How soon after that did the cars begin to move to the westward?

A. Oh, only, I don't know, only a short space of time. Just as soon as—

Q. As soon as the engine could start?

A. Yes, sir.

Q. They moved backwards then with the car on which you were, starting out on this branch leading towards No. 10.

A. Yes, sir.

Q. And they continued, then, to move in that direction until the car on which you were reached about what point?

A. Well, it was about No. 9, switch right in behind the scale house, I judge eight or ten car lengths from where Carney was standing on the ground.

66 Q. From where the train was when it stopped?

A. Yes, sir.

Q. Eight or ten car lengths in that direction. You stated that the engine ceased to exhaust and you heard this. About where was the cut of cars on which you were when that was noticed by you.

A. Just about a half of a car length west of the scale house.

Q. About how far from the point where you fell.

A. About ten feet. Because I just had time to step the length of this car and over I went.

Q. Where was Mr. Carney at that time, do you know.

A. No, sir, the last time I saw him I left him up at the switch.

Q. Do you know where Mr. Houk was at that time?

A. Yes, sir.

Q. Was his light visible to you on top?

A. I watched his light until he went over the side of the car, and I seen no light; this light went over the top over the side and I seen no more signal.

Q. About what was the distance that you say these cars traveled when you saw this—when you say this top light went from the top of the car?

A. About three car lengths in on the switch.

Q. And you say you ran about seven car lengths after it stopped?

A. Yes, sir.

Q. Do you know about the speed the train was going; this cut of cars.

A. They were not going over four or five miles an hour.

Q. That was the customary speed of cars in the yard, was it not?

Mr. Pendleton: Objected to as incompetent, irrelevant and immaterial.

67 A. Ask the question again.

Q. Please read the question.

A. Four or five miles an hour?

Q. Yes.

A. Why no. I have seen cars in the yard at 18 or 20 miles an hour.

Q. Was that the usual and customary speed for a cut of cars at this time and place.

A. I don't know as it is any custom about these cars at that one particular time.

Q. It was not nearly so rapid speed as you have seen used in the yards?

A. No, sir.

Q. You were standing in the middle of the car you say when you heard this exhaust? and moved forward towards the end of the car to put your stick in the wheel of the brake when the—

Mr. Cutlip: Answer it, the stenographer can't get your nod.

A. Yes, sir.

Q. And in falling, you say you grabbed onto the brake wheel with which hand.

A. With my left hand.

Q. And your face was westward at the time the slack began to run out of the cars.

A. Yes, I was facing right due west.

Q. And as you grabbed hold of that wheel then in going over the end of the car you say your body swung around so you were faced towards the end of the car or back towards it?

A. Body swung around from the west position facing due south.

Q. And the weight of your body pulled your hand from the brake wheel?

A. Yes, sir, I had to turn loose then because I could not hold the weight.

Q. You dropped down, did you strike the bumper.

68 A. No, sir, because I shoved out, I already had this hand there to grab something like at the end of the box car, when I seen I was going I shoved myself as far as I possibly could.

Q. About how far was it from the end of the car that you lit?

A. About as far as I could get it to get it straight, not half the distance from here to you.

Q. Three feet?

A. Something like that.

Q. Do you know what rate of speed the car was running at that time.

Mr. Pendleton: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Pendleton: Exception.

A. Nothing no more than me outrolling them they would not have been going very fast or I could not have outrolled them.

Q. Well, would you say a mile or two miles an hour or what.

A. They were going from two to five miles an hour.

Q. Can't you make it closer than that, Mr. Ward, you were there.

A. No, all I have got to go by the speed of the cars is by me out-

rolling them, I was laying between the tracks and I had to outroll them.

Q. They were not going fast enough to overtake you.

A. No, sir, they overtaken me to a certain extent.

Q. You were between the rails of that track and rolling fast enough to keep out of the way of the last cars coming towards you.

A. It would be the first car coming towards me.

Q. The last car of the cut, first towards you?

A. Yes.

Q. And were able to roll over the north rail of that branch track and get out of the way of the car.

69 A. I rolled outside of them as the car passed me.

Q. The cars didn't strike you as they went by?

A. Nothing no more than I told you they cut my overalls and my jumper.

Q. In what position were you then, Mr. Ward, when the brake beam struck you, I think you said.

A. What struck me?

Q. Brake beam.

A. I don't think I ever said anything about a brake beam.

Q. What did you say?

A. I said the draw bar.

Q. And where is that part of the car known as the draw bar?

A. It is in the middle of the car, about 32 inches above the level of the ball of the rail.

Q. In what position were you then? Were you rolling or standing or how when it struck you, when did it strike you with reference to the time you left the end of the car.

A. Just as I lit on my feet the draw bar struck me on this hip.

Q. You were then in the middle of the track?

A. Yes, sir.

Q. And that was on which hip?

A. On the left hip.

Q. On the left hip, and what effect did the blow from the draw bar have upon you with reference to your equilibrium.

A. Why, it knocked me loose from the place where my foot was hung, and knocked me down between the rails.

Q. Knocked you down and you lost your balance and began to roll?

A. Yes, sir.

Q. Which hip, you say?

A. Left hip.

Q. Do you know whether it was in the soft part of the hip near the buttock or the bone or in the muscular part, above or below.

70 A. The bruises showed the next morning right over the hip joint.

Q. Right over the joint itself?

A. Yes, sir.

Q. And it is the left foot which was sprained in this fall?

A. Yes, sir.

The Court: We will suspend until one o'clock.

And thereupon the court duly admonished the jury, and the further hearing of this cause was adj. until one o'clock.

1:00 P. M. Hearing resumed. Jury polled and all present, parties and counsel present as heretofore.

FRED WARD, recalled for further cross examination was examined by Mr. Roberts, and testified as follows:

Q. I believe you stated, Mr. Ward, when Mr. Carney gave you the signal to back up with the cut of ears there that he made some remark to you about the number of ears.

A. No, sir, he never did say anything to me about the number of ears whatever.

Q. What was the remark.

A. He says, Main line and ten all the way.

Q. What was it he said about bundle?

A. He says, after we went over the switch back towards 10, he says, look out, Honey, I am going to hand you quite a bundle.

Q. Do you know what he meant by that.

A. Extra precaution to avoid tearing up property.

Q. When did you first begin railroading.

A. You mean in the train service.

Q. No, I mean the first railroad work you did at all.

A. Well, I was practically raised in construction work. My father was a teaming contractor.

Q. Did you begin as early as 13?

A. 1913?

Q. Did you begin as early as 13 years of age?

A. Yes, sir, he was a contractor. I was right there with 71 him along that age.

Q. What kind of work were you doing at first?

A. Grade work, building railroad dumps.

Q. How long were you at that work, Mr. Ward?

A. Well, I remained with that work up until I was 17, then I was off about three months.

Q. Where was this work from the time you were thirteen to seventeen, where was you?

A. Any where from here to the southern end of the coast.

Q. I mean between the years of 13 and 17.

A. Between the years of 13 and 17?

Q. You state you began, as I understand you when you were 13 years old?

A. Yes, sir, driving teams, such as scraper teams and wheeler teams.

Q. Where did you work between the age of 13 and 17?

A. I said I worked until I was 17, and then was off for three months, and went back to work.

Q. At what places in the United States were you working?

A. In Texas part of the time, and part of the time right in the Chickasaw Nation near Ardmore.

Q. Were there any trains moving on those grades on which you were working at that time.

A. Not at that time, no, sir, because we were on the dump work and the track hadn't been laid.

Q. You were going ahead of the actual track work?

A. Yes, sir.

Q. What kind of work did you take up after this three months change and coming back to railroad work.

A. I worked three months as brakeman.

Q. What company?

A. G. C. & S. F.

Q. Where was that?

A. Cleburne, Texas.

Q. What was your next work?

72 A. Right back into grade work, construction work.

Q. Where was that.

A. Right along at the same points worked on this work, they built out the Southwestern to Ardmore. That branch. And I worked for the Santa Fe on repair work all over the Santa Fe, all over the G. C. Division system from Purcell to Galveston.

Q. How many years did you follow that work?

A. Followed that work up until somewhere along in 1904.

Q. About how old were you then?

A. About how old was I then, I was about 24 or 25, something like that.

Q. What was the next kind of work you did.

A. I farmed two years.

Q. Next kind of railroad work.

A. The next kind of railroad work I did was at Haileyville, went to work, August, 1907, went to work as a brakeman.

Q. How long did you follow that, do that work, braking work.

A. I went to Haileyville and went to work as brakeman the 2nd day of August, 1907, worked up to the 15th day of February, 1910, as brakeman.

Q. What followed that.

A. I was promoted to conductor on the 15th of February, 1910.

Q. What road were you working for as brakeman and conductor.

A. What road.

Q. Yes?

A. Chicago, Rock Island & Pacific.

Q. You worked as freight conductor until about what time.

A. February—December, 1911, from February, 1910, to December, 1911.

Q. Was that on local freight work or on through freight work.

A. Practically all my experience was local work.

Q. Were you switching, required to do switching at the local yards?

A. Yes, sir.

73 Q. Local points.

A. Yes, sir.

Q. Handling the train constantly?

A. Yes, sir.

Q. In connection with the work you had to do as brakeman and freight conductor. Did you resign from the service as freight conductor?

A. No, sir, I was discharged.

Mr. Cutlip: Wait a moment. We admit he was, it is immaterial for any purpose and incompetent.

The Court: He volunteered the statement, the question did not go to that.

Mr. Cutlip: Then I move to strike it out, about his discharge and ask that the jury be instructed not to consider it.

The Court: That motion will be sustained, and the jury instructed not to consider that part of the answer not responsive to the question.

Q. What was your next railroad work after December, 1911.

A. I worked four or five years for the Iron Mountain and Texarkana, switching in the yard.

Q. What time.

A. January, 1912.

Q. And after that what was your next work?

A. I went to work for the T. & P. out of Bonham, Texas.

(Witness refers to note book).

Q. How long did you work at that work.

A. Filed my application there on January 15.

Mr. Cutlip: No. We object to that, the question is how long did you work.

The Court: Answer the question.

A. Let's see. Well, this shows one month's service, about a month and three days.

Q. Where did you go from that, Mr. Ward, to work.

A. Where did I go from there?

Q. Yes.

A. Why I chopped cotton there out of Bonham a while.

Q. Did you go back to Haileyville then? Mr. Ward?

A. I went back to Haileyville along in the summer, I think along in August.

74 Q. Do any railroad work during that summer and fall.

A. During that summer and fall, No, sir; I was sick that summer and fall indigestion of the stomach.

Q. Did you do any work prior to the next March?

A. Did I do any work prior to the next March?

Q. Yes?

A. No, sir.

Q. What business were you engaged in?

Mr. Cutlip: We object to that as incompetent, and immaterial.

The Court: Objection overruled.

Mr. Cutlip: Exception.

A. What business was I engaged in?

Mr. Cutlip: That is his question, yes, sir.

A. I ran a rooming house in Haileyville.

Q. What kind of work did you do subsequent to that, Mr. Ward?

A. Subsequent to what?

Q. To the time you quit running a rooming house at Haileyville.

A. I went out of this rooming house on the 12th of March and was arrested at Arkansas.

Mr. Cutlip: Move to strike that out as not responsive.

The Court: Motion sustained, he did not ask you anything about that; he asked you what other work you did.

A. The other work I did was along that following summer, I went to Texas and went to work in the harvest field, running a traction binder.

Q. When did you take up the work of switching again?

A. 16th day of October, 1913.

Q. That was the year in which your accident occurred?

A. That I was hurt, yes, sir.

Q. December 10th?

A. Yes, sir.

Q. Then for a greater part of the time from the time you began railroad work around '13 until the time of your accident 75 in December, 1913, you were interested in railroad work in handling trains and the movement of trains.

A. I don't exactly understand.

Q. For the greater part of the time from the time you were thirteen until your accident happened you were engaged in working around railroad work and in handling trains and moving them about?

A. No, sir. With the exception of three months I had nothing to do with train work whatever until 1906.

Q. About how many years, then, have you had actual experience in the handling and moving of trains.

A. I can check my service letters and show you exactly.

Q. No, sir, Mr. Ward, I don't care for months and dates, only an approximation of the number of years.

A. About five years and eight months, something like that.

Q. And that was in the service as brakeman, freight conductor, and switchman?

A. Yes, sir.

Q. I don't recall, Mr. Ward, what you said the character of the work was which you have been doing since December, 1913.

A. Well, I have had several little odd jobs, Mr. Roberts. I drove a delivery wagon a few weeks, I have taken a team from the Shawnee Milling Company here to Wilson, Oklahoma, and worked here for the Chamber of Commerce a while in grade work, overseeing the work.

Q. Have you had any work in Tecumseh?

A. No, sir.

Q. Have you had any work in Shawnee, in the oil mill?

A. No, sir.

Q. In Tecumseh, in the oil mill.

A. I had a job before I got this up here, in Tecumseh, in the oil mill.

Q. Before you went to switching?

A. Yes, sir.

76 Q. You have had none of that kind of work to do since the 10th of December, 1913?

A. I had that job after I got hurt, went back over there and could not hold it.

Q. How long did you work there?

A. I went over there and staid until three or four o'clock one morning.

Q. Just a few hours, you mean?

A. Yes. And Mr. Moore send after me two or three times, the superintendent over there.

Q. When did you go back over there, what month, December, January, February—

A. Oh, I could not tell you the exact date.

Q. Could you approximate how soon it was after your accident.

A. Oh, it was something like—It wasn't that fall that I went back after the accident. I didn't go back until this winter; something over a year.

Q. Well, it was sometime then, during November or December of this year, was it, of 1914, I mean?

A. Yes, some time this winter—fall.

Q. Did you work there as long as a day.

A. No, because I could not stand it.

Q. Just a few hours?

A. The work was too heavy. Yes, sir.

Q. You say your hip is entirely recovered, Mr. Ward?

A. No, sir.

Q. Didn't you testify at the former trial of this case that the use of your hip had practically returned and there was practically nothing wrong with your hip at that time?

A. No, sir.

77 Mr. Cutlip: Beg pardon, I did not catch the answer.

Q. Last trial, three or four months ago, two or three months ago, the previous trial of this case in the Superior Court.

Mr. Cutlip: I did not catch the time was all.

Q. Read the question.

(Question read.)

A. No, sir.

Q. You are sure of that.

A. I testified at the last trial that the hip still bothered me.

Mr. Roberts: That is all.

Redirect examination by Mr. Cutlip:

Q. Mr. Moore, you state that you worked a part of the day or night, or something at the Tecumseh Oil Company.

A. A part of the night.

Q. Give us the date when that was with reference to this trial.

A. Oh, that was since this last trial, Mr. Cutlip.

Q. Since this last trial?

A. Yes, sir.

Mr. Cutlip: I believe that is all.

Mr. Roberts: That is all.

The Court: That is all, Mr. Ward, you may stand aside.

78 GEORGE S. MULDER, called as a witness in behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Pendleton, and testified as follows:

Q. State your name.

A. George S. Mulder.

Q. Where do you live, Mr. Mulder?

A. 1417 East 7th.

Q. You were sworn this morning?

A. Yes, sir.

Q. You live in Shawnee?

A. Yes, sir.

Q. In what are you engaged, in what business now.

A. Hardware business.

Q. Are you acquainted with Mr. Ward here?

A. Yes, sir.

Q. The plaintiff?

A. Yes, sir.

Q. Did you know him about the 10th of December, 1913?

A. Yes, sir.

Mr. Roberts: There is one question I want to ask Mr. Ward, I can ask him where he sits.

FRED WARD, recalled for further examination was examined by Mr. Roberts, and testified as follows.

Q. Do you remember the number of the car you were on, Mr. Ward at the time you fell off.

A. Yes, sir.

Q. What was it?

A. C56643.

GEORGE S. MULDER.

Examination in chief for the plaintiff resumed by Mr. Pendleton:

Q. What were you doing at that time?

A. I was working for the Rock Island.

Q. What capacity?

A. Working safety appliance.

79 Q. Yes, sir. Do you remember the occasion of Mr. Ward falling off a car and being hurt there?

A. Yes, sir.

Q. Where were you when that occurred, and how far from where—

A. Well, I must have been twelve or fifteen car lengths from where he fell. I was down in No. 10, coupling up the air.

Q. On switch No. 10?

A. I was down in No. 10, coupling up the air, yes, sir.

Q. Coupling up what?

A. Coupling up the air.

Q. Air brakes?

A. Yes, sir.

Q. That was your business there?

A. Yes, sir.

Q. You may state to the jury what you saw, what occurred.

A. Well, I was standing waiting there for this cut of cars that they was dropping in.

Q. The cut that Mr. Ward was on?

A. Yes, sir, waiting for them to come in so I could connect the air, and I kind of skylighted Mr. Ward, and I seen him when he started to fall, he dropped his lantern on top of the car, and I thought he went underneath the car about the center of the track.

Q. Which way did he fall when he fell?

A. Head first.

Q. On the side of the car next to you?

A. Right at the end of the car.

Q. Which direction were you from the end of the car?

A. I was almost due west.

Q. You were almost due west along the track? Near the track?

A. Yes, sir.

Q. Go ahead.

A. About the time he had time to hit the ground it was a club or something got under the wheel, and I thought it was the car went over him.

Q. You heard the noise?

A. Yes, sir, I ran up to where he was, and when I got there I saw Mr. March had gotten to him.

80 Q. Frank March?

A. Yes, sir. I asked Frank if he was dead and he said no, and I went back and looked at this car that he fell from. I thought possibly the brake staff had pulled-loose, and I wanted to get the number and initial of this car to show what condition it was in while times was good.

Q. Find anything wrong with the car or brake?

A. No, sir, I did not.

Q. Do you remember how high the brake was on that car?

A. No, sir, I don't. I didn't measure it, it was a safety appliance car.

Q. Yes, was the safety appliance on it?

A. Yes, sir.

Q. Well, did you notice at the time or about the time Mr. Ward fell whether there was anything occurred to the ears?

A. Well, it seemed to me from the noise, from where I was standing that there was a kind of a jerk.

Q. Kind of a jerk of the ears?

A. Yes, sir.

Q. What condition was Mr. Ward, in when you found him?

A. Why he was laying down by the side of the track.

Q. Was he conscious or unconscious?

A. I didn't stay to see.

Q. You left and went back to the car?

A. Yes, sir.

Q. You found he was safe and another man with him?

A. Yes, sir.

Q. When did you see him after that.

A. Well, I don't believe I saw him at all that night; they took him over to the office, I believe it was and from there—

Mr. Roberts: You don't know that?

A. Sir?

Mr. Roberts: I say you don't know that.

A. No, sir; I don't know that.

Mr. Roberts: Just your own knowledge, Mr. Mulder.

Q. You don't know anything further about the case, do you,
81 about the nature of his hurt.

A. No, sir, I don't.

Q. Never examined his foot?

A. No, sir; I haven't.

Cross-examination by Mr. Roberts:

Q. The examination you made of this car C56643, did you find the car in accordance with the Interstate Commerce Commission standard as to safety or not?

A. Well, I was not acquainted with that part of it. I had only been working out there a short time, my object in looking at the car was so I could report to my chief and let him inspect it.

Q. But you found nothing wrong with it in the examination you made?

A. No, sir, no, sir.

Q. You did not get up on the car?

A. Yes, sir, I did.

Q. Did you find his lantern?

A. Yes, sir, I did, that is the way I located the car.

Q. Where was the lantern on the car.

A. On the south side near the west end of the car on the south side of the running board.

Q. About how far from the west end?

A. Well, I should judge six or seven feet.

Q. Was it lighted or gone out?

A. The lantern was out, yes, sir.

Mr. Pendleton: It was out?

Mr. Roberts: No further questions.

Redirect examination by Mr. Pendleton:

Q. What position was the lantern in; standing up or lying.
A. No, sir, it was laying over on its side.
Q. Lying over on its side?
A. Yes, sir.
Q. How far from the center board of the car.
A. Well, it must have been eight or ten inches.
Q. Did you notice which end was next to the center?
A. No, sir, I did not.
Q. One other question. That is all. That is all.

82 FRANK MARCH, called as a witness in behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Pendleton, and testified as follows:

Q. Have you been sworn?
A. Yes, sir.
Q. State your name to the stenographer?
A. Frank March.
Q. Are you an employee of the Rock Island?
A. Sir?
Q. Are you working for the Rock Island?
A. I am.
Q. Yes, sir; were you in December, 1913, when Mr. Ward was hurt?
A. I was.
Q. Do you remember the occasion of Mr. Ward being hurt there?
A. I do.
Q. Yes, sir, what time was that? Day or night?
A. Oh, I don't remember the exact hour.
Q. I mean was it in the day time or night?
A. It was in the night.
Q. In the night, you may state what you saw there.
A. Why, some time after this—Train No. 92 had arrived there was a switching train—
Q. Yes.
A. And I had a man stationed at the fill of this train they were making up, Mr. Mulder.
Q. Yes.
A. To couple up the train as it was being put together.
Q. Yes.
A. I had to go up to our shanty after something I forgot what it was, and on my way back I passed the scale shack on the south side of the main line and saw a man laying there by the track. I walked up to him and found out who he was, and found Mr. Ward, and asked him if he was hurt, and he said he was, and I asked him how it happened, and he said he fell off a car, and he complained of his foot and leg hurting, and he took his shoe off and examined his foot, and about that time Mr. Carney was coming down a cut of cars on the main line, and I told him he had a man hurt, and he asked who

83 it was, and I told him, and he came and looked at Ward, and went over to the office, and I helped him to the car shanty.

Q. Helped him over to the office?

A. No, over to our shanty, over to the car shanty.

Q. Oh, helped him over there. Well, from his actions did he seem to be hurt?

A. Why, he appeared to be.

Mr. Roberts: That is objected to as a conclusion.

The Court: Yes, that objection will be sustained.

Q. What condition did you find him in so far as you know.

A. Why, he was laying—

Q. I am not speaking of whether he was hurt or not.

A. Why, I could not tell by examining his foot or not, whether it was hurt very much or not, whether it was sprained or how bad it was, but I got his arm over my shoulder and helped him to the shanty, he walked with my assistance over there.

Q. Un-huh. Mr. Ward requested you to pull off his shoe, did or didn't he?

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained. The witness testified he did pull off the shoe.

Q. And you looked at the foot?

A. Yes, sir.

Q. You could not tell whether the foot was strained any; any ligaments broken or not.

Mr. Roberts: Objected to as repetition.

The Court: Overruled.

Mr. Roberts: Exception.

A. I could not tell whether there was anything.

Q. At that time there was no swelling, was there, or not?

A. No, not at that time.

Q. I believe that is all.

84 Cross-examination by Mr. Roberts:

Q. Did you examine the car later?

A. Sir?

Q. Did you examine that car later?

A. I did.

Q. Did you find anything out of order with the car?

A. Not a thing.

Q. I will ask you to state whether or not it conformed with the Interstate Commerce Commission standard of cars.

Mr. Cutlip: Wait a minute. We object to that as not proper cross-examination.

The Court: Objection sustained. It would not make any particular difference, it would be a matter of defense if it is competent.

4—Rec.

Mr. Roberts: That is all.

The Court: What were your duties there?

A. Car inspector.

The Court: Car inspector?

A. Yes, sir.

That is all.

The Court: Call another witness.

85 JOHN McBROOM, called as a witness in behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Pendleton, and testified as follows:

Q. Give your name to the stenographer.

A. John McBroom.

Q. Are you acquainted with Mr. Ward here?

A. Yes, sir.

Q. The plaintiff. Are you working for the Rock Island?

A. Yes, sir.

Q. Were you in December, 1913, when Mr. Ward was hurt there?

A. Yes, sir.

Q. You can state what capacity you were working in at that time.

A. Well, I was working on the switch-engine.

Q. You were switchman also?

A. Yes, sir.

Q. Worked under that same switch engine?

A. Yes, sir.

Q. Under Mr. Carney?

A. Yes, sir.

Q. How was the train divided up, distributed there that night, you may state.

A. Well, sir, I could not tell you, I could not tell you. The best of my knowledge about that, why, we went down and got one cut of cars off of this train on the main line—

Q. Yes.

A. And I went down on the rear line and bled the air off the rest of the cars.

Q. What do you mean by that?

A. Released the air. The air stays in as long as—

Q. You uncoupled them?

A. No, I did not uncouple them. Just bled the air. They have a little release cock on them, and I pulled that.

Q. So that when you pulled that the brake would not be in the way, is that the idea?

A. Yes, well yes.

Q. Well, the first part or bunch of cars or set of cars that were cut loose from that train after the engine struck it, which way were they put?

86 A. They was taken east.

Q. They was taken east?

A. Yes, sir.

Q. Switched north and south there.

Mr. Roberts: The gentleman said he didn't know what became of them.

The Court: Ask him if he knows where these cars went or not.

A. Where these cars went?

A. Yes.

A. No, sir, I don't.

Q. Where were you when these cars were brought up?

A. When they were brought up to switch out?

Q. Yes, sir. When they were taken loose from the engine, train?

A. When they was first cut off I was standing with Mr. Carney and Ward, when they left I stood there, and they came on by.

Q. Mr. Carney and Ward came right up with them?

A. Yes, sir.

Q. And you did not see where they went?

A. —.

Q. What did they do next with the train where you was?

A. Mr. Carney came back down and got another bunch of cars and taken them back.

Q. Back east again?

A. Yes, sir.

Q. Did you know where he took them?

A. No, sir.

Q. You remained down there?

A. No, sir.

Q. You went back with him?

A. Yes, sir.

Q. How many cars did they move?

A. The time I went up?

Q. Yes.

A. I could not say.

Q. Did they leave any behind?

A. Yes, sir, I don't know how many they left down there. They left the caboose and two or three cars.

Q. Uh-huh. Can you approximate how many cars were brought up this time, twenty, twenty-five—

A. When I came out?

87 Q. Yes, when you came out.

A. Oh, there might have been seven or eight or ten cars.

Q. Well, what was done when they was brought out.

A. Well, we switched them out.

Q. First where they stopped when they were brought out.

Mr. Roberts: We object unless that is this cut of cars involved in the action.

The Court: Inquire if this was the cut of cars brought up at the time Mr. Ward was hurt.

Q. Were these cars the cars Mr. Ward got on to take down to Switch 10 afterwards?

A. No, sir. Oh, there might have been one or two of them, there might have been one or two of those cars that came back on the main line, it might have been a part of the same cars taken out when he went out, I could not say positively they were.

Q. I am trying to get the whole situation. I think it would be material.

The Court: The particular part would be if this witness saw this accident or anything that led right up to it.

Mr. Pendleton: If the court will permit me——

The Court: Proceed.

Q. Now, when they brought this bunch up that you say Ward was not with, where was Ward at that time.

A. I could not say where he was, I did not see him at that time.

Q. You could not say where he was you did not see him at that time. Yes. What did you do with those cars that you brought up at that time.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, and not within the issues of this case.

The Court: Sustained.

Mr. Pendleton: Exception.

88 Q. When did you next see Ward?

A. Well, I cannot say. Probably ten or fifteen times afterward. The first time I remember seeing Mr. Ward afterwards was down here on the street one day. I cannot say just how long it had been, but quite a while afterwards.

Q. Yes. Refreshing your recollection don't you remember Mr. Ward got on these cars on the front car by Mr. Carney's direction and Mr. Carney made a remark to him, what to do with them; something of that sort.

A. No, sir, I don't remember it.

Q. When they pulled up with these cars didn't Mr. Carney tell you, while Mr. Ward was there, Line up for Number 10.

Mr. Roberts: Objected to as cross examination of his own witness.

The Court: Overruled.

Mr. Roberts: Exception.

A. To line up for 10?

Q. Yes.

A. No, sir, I did not go out with that cut of cars at all.

Q. Yes. Well, what did you do.

A. I staid down on the rear end of these cars, these cars was left on the main line when Mr. Ward and Carney came out.

Q. Staid with these other cars until Mr. Ward and Mr. Carney came back.

A. Until Mr. Carney came back.

Q. Until Mr. Carney came back?

A. Yes, sir.

Q. Well then were any cars hitched on there.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: Sustained.

Q. Didn't you testify here in this case before as a witness?

A. No, sir, I did not.

Q. Beg pardon then, I know I had a talk with him.

89 Mr. Pendleton: That is all.

Mr. Roberts: No questions.

The Court: Did you see this accident?

A. No, sir.

The Court: You don't know, really, anything about the accident.

A. No, sir.

Mr. Cutlip: If the Court please I want to read the rules that have been introduced here and marked Exhibit A.

The Court: Mr. Cutlip. The court is of the opinion, while I don't want to direct you how to try your lawsuit, but call the witness's attention to the page and the number of the rule, I don't think that was done before, put him on the stand and make it intelligible.

FRED WARD recalled for further examination in chief, was examined by Mr. Cutlip, and testified as follows:

Mr. Roberts: For my information, before the examination is started, the entire book of rules is in evidence.

Mr. Cutlip: I have not offered it.

The Court: It is so indefinite when they went over it before we could not tell.

Mr. Roberts: As I understood it it was offered in evidence as Exhibit A, the entire rules.

The Court: But now counsel wants to introduce particular rules.

Mr. Cutlip: Yes, sir.

The Court: And then counsel for the defense can go into any particular of it he wants.

Mr. Roberts: Would it not be proper at this time for counsel to read any rules they wished.

The Court: Yes, sir.

90 Mr. Cutlip: That is what I was going to do, and he, the court wanted—

The Court: If counsel have no objection I will permit you to read the particular rules you want.

Mr. Roberts: I have none.

The Court: Proceed, then without anything further.

Mr. Cutlip (reading): The Stop signal is swung across the track thus. Proceed signal B raised and lowered vertically. The Back signal C swung vertically in a circle at half arm's length when the train is standing. The train has parted, D, swung vertically in circle at arm's length across track when the train is running. Apply air brakes E swung horizontally above the head when the train is standing. When given on freight train when the train is running

to protect rear, to be answered by a like signal from the rear. Release the air brakes or bleed the air. F held at arm's length above the head when the train is standing.

Now these that have been offered are found on page 1. No. It is page- 15 and 16, beginning at "The manner of using the signals," "Indications", and appears in the Rock Island rules and regulations of the operating department under date of April the 1st, 1910, as effective. The rule I want to call attention to is the first two, the stop and the one to proceed. (Hands book of rules to the jury.)

91 Dr. G. H. SANFORD, called as a witness, in behalf of the plaintiff, being first duly sworn, was examined by Mr. Pendleton, and testified as follows:

Q. Give the stenographer your name?

A. G. H. Sanborn.

Q. Are you a practicing physician, Doctor?

A. Yes, sir.

Q. How long have you been engaged in the practise?

A. Fifteen years.

Q. Yes, sir, what college—

A. University of Vermont.

Mr. Roberts: We will admit the doctor is qualified as a practising physician and surgeon under the laws of Oklahoma.

The Court: Proceed, then.

Q. Doctor, are you acquainted with and have you been acquainted with Mr. Ward here, the plaintiff in this case.

A. Why, I examined him.

Q. Yes, sir, you made an examination. When was that Doctor?

A. It was on the 22nd of February.

Q. Just a few days ago?

A. Yes.

Q. Yes, sir. What part of his anatomy did you examine, Doctor?

A. His left foot.

Q. Left foot. Yes. And of what was he complaining?

Mr. Roberts: We object to that as incompetent, irrelevant and immaterial.

The Court: That objection will be overruled in that restricted form.

A. Pain in the left foot, and just below the ankle.

92 Mr. Roberts: An exception to that ruling of the Court.

Q. Doctor, did you from your examination—you may state to the jury what you found.

A. I found tenderness on pressure just below the ankle on the top and outside of the foot: Just a little externally to the center, not in the center of the top of the foot, but a little bit to the outside, just below the ankle.

Q. What, Doctor, would be your opinion as to the cause of that,

I don't mean what hurt him, but the internal cause? What was the cause that made that pain?

Mr. Roberts: We object to that as incompetent, irrelevant and immaterial, and not within the issues of this case.

The Court: I am inclined to think that the last question he asked. He asked two questions. The last perhaps makes it incompetent.

Q. Read the question. (Question read.)

Mr. Roberts: Objected to on the ground of being too indefinite. The Court: Sustained. Frame another question.

Q. Doctor, what in your judgment was the difficulty that caused this tenderness in the foot.

Mr. Roberts: We object to it, indefinite, incomplete, incompetent, irrelevant and immaterial, no relation to the issues in this cause, not based on the facts in evidence.

The Court: Objection overruled.

Mr. Roberts: Exception.

A. Well, there are several things that might have caused that just there.

Q. Yes.

A. It might have been due to an old strain or it might have been due to a ruptured ligament or it might have been due to an old fracture. It might have been due to an old bruise.

93 Q. Yes. Now Doctor, in that injury to the foot, what would be the effect upon the foot if the ligament that held up the arch of the foot had been strained or ruptured.

Mr. Roberts: Object to it as incompetent, irrelevant and immaterial, not proper in form; hypothetical question, and not based on or containing a fair summary of the evidence in the case.

The Court: Objection sustained.

Mr. Pendleton: Exception.

The Court: Doctor, describe completely to the jury your examination of this foot and tell them all about its appearance, and how it was.

A. Why I examined the foot.

Mr. Cutlip: Let him put the plaintiff up there and examine the foot.

The Court: No. Proceed to describe the result of your examination and what you found.

A. Why, I found a flat foot, what is known as a flat foot with tenderness just below the ankle, tenderness on pressure, here (indicating), complained of quite severe tenderness between the os calcis or the bone which forms the heel and the cuboid which forms the heel, quite a severe tenderness there and in on the inside, the inside seemed to be practically normal. There was tenderness on pressure on top, on the top and outside of the foot.

The Court: Proceed, gentlemen.

Q. Doctor, if this injury that you speak of was the result of any one of three causes which you mentioned, what in your opinion—what is your opinion, cut that out, as to whether or not that injury is probably permanent.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, improper hypothetical question, indefinite, incomplete and not a fair summary of the evidence in the case.

94 The Court: Objection overruled.

Mr. Roberts: Exception.

A. Give me the question again.

Q. Read the question.

(Question read.)

Mr. Roberts: —speculative, problematical.

Q. Read the question.

(Question read.)

Mr. Roberts: The court rules?

The Court: That was the question. I overruled the objection.

Mr. Roberts: The additional objection?

The Court: Yes, sir.

Q. Your answer.

A. In order to give an opinion on that I would have to know how long that condition existed.

Q. Yes, sir.

A. —already.

Q. Yes, sir. All right. Considering that the injury to the foot occurred on the 10th day of December, 1913, and it continued, and there had been no other injury up to this time. What would you think, in connection with your examination of it and that history of the case.

Mr. Roberts: Object to the question as not a fair summary of the evidence and including facts not in evidence, improper in form, not a proper hypothetical question, indefinite and incomplete.

The Court: Overruled.

Mr. Roberts: Exception.

Q. Answer the question.

A. If that tenderness had existed since 1913, I should think probably it would continue to exist, yes, sir.

Q. You can state whether or not if it continues to exist it would interfere with the strength of the foot and the usefulness of the foot.

Mr. Roberts: We object as calling for an answer based on speculation or hypothesis, which has not been proved and cannot be proved.

95 The Court: Objection sustained.

Mr. Pendleton: That is all, Doctor.

Cross-examination by Mr. Roberts:

Q. Doctor, will the use of the foot in the condition which you found the left foot of the plaintiff in, have a tendency to reduce the condition in which you found it.

A. Give me the question again.

Q. Will normal use of the foot in the condition in which you found this one of this plaintiff, have a tendency to reduce the symptoms you found there.

A. You mean the normal exercise of the foot?

Q. Yes, sir.

A. The normal exercise of the foot might reduce it.

Q. And with proper exercise under the ordinary or proper conditions with treatment, would it not be possible to remove it entirely, in your judgment.

A. Well, I could not say whether it would be. I could not state positively whether it would be possible or not.

Q. You are not prepared to say now from what you saw that that injury to that foot is permanent.

A. No, not absolutely.

Mr. Roberts: That is all.

Redirect examination by Mr. Pendleton:

Q. You based your opinion on your examination and also the statement as to the length of time that the injury had been made?

A. Yes, sir.

Mr. Pendleton: That is all, Doctor.

96 Dr. J. M. BYRUM, called as a witness in behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Pendleton, and testified as follows:

Q. Dr. Byrum, state your name.

— J. M. Byrum.

Mr. Pendleton: You admit Dr. Byrum is qualified?

Mr. Roberts: All these doctors, we admit all of them.

Q. Dr. Byrum, Doctor, I will ask you if you know Mr. Ward here, the plaintiff, have you met him, do you know him?

A. I met him once, yes, sir.

Q. Have you made an examination of his foot?

A. Yes, sir.

Q. When was that, Doctor?

A. Two or three days ago at the office.

Q. Yes, sir, at the office, two or three days ago. Which foot was it?

A. Left foot, if I remember right.

Q. Yes, sir. Left foot. You did?

A. Both feet.

Q. You may state to the jury, Doctor, what, if anything, you found the matter with the foot?

A. Well, the condition of flat-foot, and in the left foot there was,

seemed to be an increased mobility of the outer side of the foot, and a slightly enlarged area over the instep, more prominent than the right foot.

Q. Did you find in your examination any tenderness?

A. Seemed to be some tenderness and pain on moving——

Q. Yes, sir.

A. —bone up and down.

Q. Yes, sir. Yes, sir. From your examination, Doctor, did you notice whether any of the bones were mobile?

A. Yes, the bones on that side of the foot were more movable than the similar bones on the other foot.

97 Q. Uh-huh. Yes, sir. Yes, sir. Were more movable than the similar bones on the left foot. What would you say that was caused by, Doctor?

Mr. Roberts: We object to that as incompetent, irrelevant and immaterial, and purely speculative, and not possible to have any definite answer to the question in that form.

The Court: Objection overruled. Ask him if he knows.

Q. Yes. If you were able to form an opinion, you may state your opinion.

A. That is caused by either a tear or an unusual elongation of the ligaments binding the two bones together.

Q. Yes, sir. A stretching of the ligaments; that's right.

A. Yes, sir, I say the two bones—the various bones there.

Q. Yes, sir, yes, sir. Doctor, with this statement: The injury to that foot occurred on that foot on the 13th of December, 1913; from your examination of the foot and from that statement and the history of the case, what would be your opinion as to whether or not this injury to the foot was permanent.

Mr. Roberts: Just a minute. We object as incompetent, irrelevant and immaterial, not a proper hypothetical question; and not a fair summary of the evidence. The question is incomplete because it does not state the evidence in such a form that it can be restated to another expert; because it calls upon the witness for evidence that came to him personally outside of the record in this case.

The Court: Objection overruled.

Mr. Roberts: Exception.

A. What was the question?

Q. Read the question.

(Question read.)

98 A. This condition of the foot is a permanent condition, in my opinion.

Q. Yes, sir. Well now, Doctor, state, Doctor, whether in your opinion that foot will ever hereafter be as good as the other; as it was before it was hurt.

Mr. Roberts: We object to that——

The Court: That objection is sustained.

Q. I will ask you, Doctor, whether in your opinion that injury

to the foot there, described, will diminish the strength and usefulness of the foot, or otherwise?

A. It will, that condition is—is permanently—What you mean is the arch of that foot?

Q. Yes, sir.

A. Will be a source of annoyance.

Cross-examination by Mr. Roberts:

Q. You say you found the condition of flat-foot in both feet?

A. Yes, sir.

Q. What part of the foot does that disease known as flat-foot affect, Doctor?

A. It affects the arch of the foot.

Q. The arch and the bones forming the arch?

A. The bones do form the arch.

Q. And these bones that you have spoken of in the left foot as being movable were part of the arch of the foot that is affected by the disease of flat-foot?

A. They are part. They are the outer side of that arch. Yes, sir.

That is all, Doctor.

99 Dr. —— HAMILTON, called as a witness in behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Pendleton, and testified as follows:

Q. Have you been sworn?

A. I have been sworn.

Mr. Pendleton: Do you admit Dr. Hamilton is a qualified physician.

Mr. Roberts: I don't know Dr. Hamilton.

Q. Doctor, you are a practicing physician here?

A. I have been, yes, sir.

Q. How long have you been in the practice, Doctor?

A. About 34 years.

Q. About 34 years?

A. About thirty-four years.

Q. Are you a graduate of any——

A. How is that.

Q. Are you a graduate of any school?

A. Yes, sir.

Q. Of medicine. What?

A. Ohio Medical at Cincinnati, Ohio.

Q. How long have you been a—practicing in this town, Doctor?

A. Well, ever since the town was here, before there was a town here.

Q. Yes, sir. For a number of years?

A. Yes, sir.

Q. Are you acquainted with Mr. Ward, here, have you met him?

A. I have met him, yes, sir.

Q. Did you make an examination of his feet recently?

A. I did, sir; yesterday, or day before.

Q. Yes, sir. Within the last day or so? which foot was it, Doctor?

A. I believe it was the—

Q. Left foot? Yes, sir.

A. I believe it was the—

Q. Did you make an examination of it.

A. As best I could, yes, sir.

100 Q. Yes, sir. State to the jury the result of that examination, what you found in the matter of the foot, if anything.

A. Well that was a pretty hard matter to say what you did find. I found it badly contused—foot—apparently it some time had been badly wrenched. And in—it looked like in the region of the cuboid bone that some of the ligaments had been torn loose, because in working the foot, in holding the os calcis and sliding and working the other portion you could feel it slip and grate.

Q. Feel what slip?

A. Bone.

Q. Bone? Some of the bones in the foot were loose?

A. Yes.

Q. Yes, sir, loose.

Q. Well, what would that be the result of, Doctor, You have stated, however, it was on account of the ligaments.

A. Possibly on account of the ligaments being torn loose from it—from each other.

Q. Yes. In your judgment, an injury of that sort, Doctor, you can state whether or not it is sometimes permanent?

A. Why, yes, sir.

Mr. Roberts: We object to it as incompetent, irrelevant and immaterial.

Mr. Pendleton: I am leading up—

The Court: That question would be objectionable, you can frame one that will take in the whole scope.

Mr. Pendleton: Yes, sir. I will state first—don't take down what I say, but just withdraw it without saying anything about it.

Q. Considering that this foot was injured on the 10th of December, 1913, taking that into consideration together with your examination.

Mr. Roberts: Is that all the question?

Mr. Pendleton: Wait. No, sir.

101 Q. — taking that together with the result of your examination state to the jury what in your opinion, whether in your opinion the injury to that foot is permanent.

Mr. Roberts: Now, we object to it as incompetent, irrelevant and immaterial; not a proper hypothetical question, calling upon the witness for facts out of his knowledge, and not within the record in this case, incompetent, irrelevant and immaterial; hypothetical—

The Court: Overruled.

Mr. Roberts: Exception.

A. Considering the time from the date—from the injury, and the condition of the foot is in now, it looks like it was a permanent injury.

Q. Permanent injury?

A. Yes.

Q. Yes, sir. State whether or not his foot in the condition you find it is diminished in strength and usefulness or not?

A. Read that question again, please sir.

(Question read.)

Mr. Roberts: Object to it as incompetent, irrelevant and immaterial, calling for a conclusion.

The Court: Objection overruled.

Mr. Roberts: Exception.

A. Why, it shows a loss in strength on account of the—certain atrophy of the muscles in above there. In comparing the two feet you can see, see where there is an atrophied condition of the left foot.

Q. Yes, sir. What do you mean by that.

A. A dwindling.

Q. Dwindling? Yes.

A. Not as strong.

Q. That is all, yes, sir, not as strong.

Cross-examination by Mr. Roberts:

102 Q. Which foot is it that is weak?

A. What is it.

Q. Which foot is it that is weak.

A. If I am not mistaken it is the left foot.

Q. You are not sure?

A. I don't remember which it was, for I never saw the gentleman until a day or two ago.

Q. What do you mean by contusion, Doctor.

A. Contusion? It means a bruise, an injury. I don't call that a contusion.

Q. That is what you said a while ago.

A. Well, I—contused means bruised, twisted.

Q. This foot was contused, bruised?

A. Pardon?

Q. This foot was contused, bruised when you examined it.

A. I did not say it was bruised when I examined it. From the history he gave me of the injury. I said twisted, a twisting and tearing of these ligaments.

Q. Was the foot discolored when you examined it.

A. Not a bit, sir; very tender, though.

Q. So he said?

A. So he said.

Q. Do you know whether it was tender.

A. I could not tell you, I did not feel of it. I could not feel it.

Q. Pain is subjective, isn't it?

A. Well, not exactly subjective; he seemed to flinch very perceptibly.

Q. You are not answering the question. Pain is limited to the person who expresses the fact that he has pain, isn't it.

A. I don't know as I exactly understand that question.

Q. When I say I am in pain that restricts that suffering to me?

A. Yes, sir.

Q. That is subjective in that respect?

A. Yes, sir.

Q. Then when a patient comes to you and tells you he is suffering pain, you don't know from his statement whether he does or not?

103 A. Unless you find evidence of some inflammatory process.

Q. Do you know, aside from his statement that he is suffering pain.

A. No, I don't know that he is suffering pain, but the condition indicates—

Q. You might find there evidence of an abnormal condition?

A. Yes.

Q. But you don't know whether he suffers pain except when he says so.

A. That is all, and flinch.

Q. And people flinch sometime when there is no pain suffered?

A. Absolutely.

Q. Don't they fool you doctors lots of times with these things.

A. Well, some of them do.

Q. You don't want the jury to understand then, Doctor, that this foot was contused as you said it was at first.

A. Well I don't;—what I had reference to it was torn and the ligaments in there that holds the bones together or the bone.

Q. Well, could you see the tear.

A. That was a slipping up and down.

Q. Did you try the other foot that way.

A. Yes, sir, had them both stripped bare, and compared them.

Q. What is your opinion as to whether there was a fracture there.

A. I don't know there was a fracture, there might be a piece of the cartilaginous portion of the bone torn loose, but I could not tell it.

Q. All you did was to manipulate the foot with your hand?

A. Yes, sir.

Q. Take any ex-ray?

A. No, sir.

104 Q. Made no other test except what they call palpitation.

A. I suggested that he ought to have a couple of ex-ray pictures made, both anteriorly and sideways.

Q. And if he had those made and they showed a normal condition of the foot—

A. Well, you could hardly tell about those ligaments being torn that way with an ex-ray picture.

Q. That is all, Doctor.

Redirect examination by Mr. Pendleton:

A. An ex-ray picture only shows fractures of the bone?

A. An ex-ray picture only shows a fracture of the bone.

Q. It does not show a stretched ligament?

A. No, sir.

Q. Doctor, from your examination of the plaintiff's foot, you say he flinched. State whether in your judgment the foot was in a condition that it was likely to be tender there and give him pain when you made the examination in question.

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, purely a conclusion.

The Court: Objection overruled.

Mr. Roberts: Exception.

A. Read the question. (Question read.) I think so, yes, sir.

Q. What in your opinion—kill that,—state whether in your opinion if the plaintiff was assuming, pretending pain, or whether it was real.

Mr. Roberts: Object to it as incompetent, irrelevant and immaterial.

The Court: That objection will be sustained.

Mr. Pendleton: Except. That is all.

Mr. Roberts: Doctor, are you a member of the Pottawatomie County Medical Association.

A. No, sir, it is my own fault I have not been.

Mr. Pendleton: Objected to as immaterial, a man don't necessarily have to be in there to be a doctor.

105 The Court: Call the next witness.

Mr. Pendleton: Plaintiff rests.

The above and foregoing is all of the testimony introduced by the plaintiff in chief, being all of the testimony both on direct and cross-examination the objections of counsel, the rulings of the court thereon, and the exceptions taken by counsel.

Mr. Roberts: May we have about five minutes intermission.

The Court: Four minutes.

Mr. Roberts: Four will be an abundance.

The Court: I thought so.

(Jury duly admonished and excused.)

106 Mr. Howell: Comes now the defendants and demur to the evidence of the plaintiff for the reason that the evidence, together with all the reasonable inferences therefrom fails to make

out a case in favor of the plaintiff and against these defendants or either of them.

The Court: Overruled.

Mr. Howell: Exception.

107 A. J. CARNEY, called as a witness in behalf of himself and the defendant company, being first duly sworn, was examined in chief by Mr. Howell, and testified as follows:

Q. Take that seat and give your name to the stenographer.

A. A. J. Carney.

Q. State your name.

A. A. J. Carney.

Q. Where do you live, Mr. Carney?

A. 602 south Beard.

Q. Are you a defendant in the case of Fred Ward against the Rock Island and A. J. Carney?

A. Yes, sir.

Q. Do you know Fred Ward, the plaintiff?

A. Yes, sir.

Q. Are you now working for the Rock Island Railway Company?

A. Yes, sir.

Q. Were you working for the company in the month of December, 1913?

A. Yes, sir.

Q. Was Mr. Ward working with you?

A. Yes, sir. On that day, yes sir.

Q. What was your business?

A. Engine foreman.

Q. At that time engine foreman?

A. Yes, sir.

Q. What does the engine foreman do?

A. Well, he has charge of the switching in the yard; making up trains.

Q. Did you have a switching crew in the yard of the Rock Island on the night of December 10, 1913?

A. Yes, sir.

Q. Who was in that crew?

A. Fred Ward, McBroom, Houk, and Rowe and Mulders with engineer Russell and fireman George Sparks.

Q. Sparks?

A. George Sparks. Yes, sir.

Q. Was that the regular size crew?

A. That was the regular size crew, yes, sir.

108 Q. Had Mr. Ward worked in the yard before that night switching?

A. Yes, sir.

Q. Had he worked in your crew?

A. Yes, sir.

Q. A number of times?

A. Several times, yes, sir; I don't remember——

Q. Mr. Carney, how long have you worked out in the yards, in the west yards of Shawnee.

A. Since March 14, 1908, I think that is the correct date.

Q. Are you familiar with those yards?

A. Yes, sir.

Q. Which way did the tracks of the railroad company run in the yards, east and west, or north and south?

A. East and west.

Q. How many tracks are there, approximately in that yard?

A. Thirteen outside of the main line.

Q. What is the main line used for?

Q. For outbound trains leaving, or arriving, and passenger traffic, mostly.

Q. Is that a switch track, that track on which the trains run through the yard? or a track on which trains run through the yard?

A. The track on which the outbound trains run through the yard, and the inbound.

Q. How many switch tracks are there?

A. There is 13.

Q. Where is track—switch track No. 10, located with reference to the main line track?

Q. It is the fourth track on the south side of the main line.

Q. How is that track No. 10 connected with the main line track, if it is connected?

A. There is a lead; what is known as a lead that leads off kind of in a southwesterly direction down—No. 6, 7, 8, 9, and No. 10 leads directly off of this lead that connects up with the main line on top of this hump.

109 Q. How is that lead connected with the main line?

A. Directly.

Q. With a switch?

A. With a switch stand, yes, sir.

Q. Now, on the night of December 10, 1913, what was your crew doing, about the time that Mr. Carney (meaning Ward) fell off the car.

A. 92 arrived from the west—

Q. Where did it stop when it reached the yard in Shawnee?

A. On the main line.

Q. How far west or east of the switch head leading down to track No. 10.

A. About eight car lengths, possibly nine.

Q. What became of the engine and crew that brought that No. 92 train into Shawnee Yards.

A. Well as soon as they stopped they cut the engine off, and put it in the roundhouse and they were released.

Q. Did your crew then take charge of the train?

A. Yes, sir.

Q. Had no engine, just a bunch of cars?

A. Just a bunch of cars, yes, sir.

Q. What did you do first?

Q. After I got the switch list I come down against the head of—the head end of 92 and got a hold of seven or eight cars.

Q. You took those out, did you.

A. Yes, sir, that was the first.

Q. What was the next cut?

A. The next cut was I believe 21 cars, something like that, 20 or 21.

Q. Who was helping you directly with that cut of cars?

A. Mr. Ward.

Q. You mean by cut of cars a number of cars?

110 A. Yes, sir. A number over one.

Q. In your switchman language you call a number of cars a cut of cars?

A. A cut of cars, yes, sir.

Q. What engine were you using.

A. 209 if I am not mistaken.

Q. Well, was it a switch engine?

A. Yes, sir.

Q. Mr. Russell was engineer?

A. Mr. Russell was engineer.

Q. And Sparks fireman. Which direction was it headed?

A. West.

Q. Now, you say you had your switch list and you went down to this cut of 21 or 22 cars. Who went with you.

A. When we first went down there I sent the first cut—

Q. I mean these 21 or 22 cars.

A. Mr. Ward and I went down.

Q. What did you go down there for.

A. To get the necessary cars for this train of this train came in to rebill 92 east again.

Q. What did you have with you when you were checking the cars?

A. The switch list.

Q. Did you and Mr. Ward check them?

A. I checked them.

Q. You cut off the 22 cars?

A. Yes, sir.

Q. What, if anything, did you do then?

A. Well first. Well I says, to Ward, I says, we will cut right here.

Q. Where were you standing then?

A. Right at the end of the cars.

Q. How far from the switch head leading onto track No. 10?

A. Possibly thirty car lengths.

Q. East or west?

A. West.

Q. All right. What did you, what did he do, if anything.

111 A. I says to him, we will cut right here, and I climbed up on top. I says have you cut it, he says, yes, and I give the sign to back up, to back up.

Q. Which way was this cut of 22 cars pulled out after you gave the sign to back up?

A. Pulled eastwards.

Q. What became of Mr. Ward.

A. He was right on top of the car with me.

Q. Did he climb up when the car started out.

A. Yes, sir, he climbed up the top with me.

Q. How far was that cut of 22 cars pulled east on the main line.

A. Well they was pulled back off this cut off switch possibly 30 cars.

Q. What cut off switch?

A. That leads from No. 10, off the main line.

Q. What happened then.

A. We stopped them there, and I threw the switch for—that leads towards No. 10, and started ahead with my cut, and hollered to Mr. Ward.

Q. What did you do, "you started ahead with your cut." What did you do.

A. Give the signal to go ahead.

Q. What did they do?

A. Started ahead.

Q. Who?

A. The engineer and the cut of cars.

Q. Where was the engine with reference to you, east or west?

A. East of me, around the curve.

Q. Where was Mr. Ward at the time.

A. Right on top of the head car.

Q. What happened then.

A. He started—I hollered up to him. I said, Look out, Honey, I says, you have got a pretty good cut.

Q. What did you do then?

A. When the cut came to me—

Q. What do you mean by "when the cut came to me"?

112 A. The amount of cars I wanted to go on 92.

Q. How many cars were you going to put on 92 on this track from 92, from the number you had taken out with Mr. Ward.

A. There was eleven on that cut and I had one car to throw back on the main line, and shove everything else on No. 10.

Q. Then Mr. Ward was to ride 11 cars on track No. 19?

A. Yes, sir.

Q. Well, what did you do then?

A. I had the engineer slow up.

Q. When?

A. About the time the 7th car I think was passing the switch that leads towards No. 10.

Q. Where was Mr. Ward at that time.

A. On top of this car, presumably, I don't know.

Q. Did he go around towards switch No. 10 on top of the car?

A. Yes, sir, the last I saw of him, he went around towards switch No. 10, on top of the car.

Q. Why did you have the train slow up as you approached the place you were cutting off these 11 cars?

A. Well sir; it was for safety for all concerned working with me, because he had quite a bunch of cars to handle and I wanted to get them down to where I was satisfied absolutely and absolutely knew

he could handle them with safety to him and the property of the company.

Q. Why was it necessary to slow them down.

A. Going too severe a rate of speed for a man to handle them by himself.

Q. How fast were they going?

A. Possibly five or six miles an hour?

Q. Is that the ordinary speed you have to go at that time and place.

Mr. Pendleton: Objected to as incompetent, irrelevant and immaterial. And we object to "going too high a rate of speed for a man to handle."

113 The Court: Sustained.

Q. Was that the ordinary rate of speed that you had to run those cars.

Mr. Cutlip: Object.

Mr. Howell: Wait a minute until I have finished this question. I will have to take the attitude of Judge Pendleton——

The Court: Go ahead.

Q. Was the rate at which the cars were going when you caused the engine to be slowed up an ordinary rate of speed necessary to run the cars so that they would be put down on switch No. 10?

Mr. Cutlip: We object to that as leading and suggestive, and for the reason that the word "ordinary" is there. He has not shown what was ordinary or extraordinary, and calling for a conclusion of the witness to this extent; whether it was ordinary or extraordinary.

The Court: The word "ordinary" is probably used there in its ordinary acceptation. Overruled.

Mr. Cutlip: Exception.

A. Yes, sir, on account of the engine and the bulk of the cars being down hill behind the hump eastward.

Q. How many cars were behind the hill eastward?

A. About—well, they all lay behind when we started the cut up, but when I made the cut there was about twelve.

Q. When you made the cut how many cars were towards No. 10, track No. 10?

A. Eleven.

Q. What became of the other cars.

A. I kicked one to the main line, rode that myself, and the rest were shoved in on top of No. 10, on this other cut that Mr. Ward rode in there.

Q. Then you uncoupled the 11 cars from the 22 cars, the last 11 cars towards the west on No. 10?

A. Yes, sir.

114 Q. Now, you say there was a hill, what do you mean by that?

A. Well, it is an elevation that runs directly north and south across the yard there at this particular point where this switch is connected with the main line that leads towards No. 10, and after

we get by that going eastwards we lay behind the hill, and an engine has to use all the effort they have to get over the hill with ten to twenty loads.

Q. What is that hill or elevation.

A. An elevation known as a hill among us switchmen, know that as a hill, a hill yard.

Q. How much of an elevation is it.

Mr. Cutlip: You mean by grades.

Q. Oh, just approximately.

A. Well I should judge you would call it a water grade.

Mr. Cutlip: Not his judgment, what he knows.

The Court: Estimate it.

Q. You are just estimating it.

A. Yes, sir, what is known as a water grade.

Q. Water grade.

Q. Now, what was the effect upon the cars when you caused the engineer to slow up the speed of his engine.

A. Well I noticed a slack running out one car to another—gradually.

Q. The engine was not stopped abruptly when you gave the signal?

A. Never did stop.

Mr. Pendleton: Object to that because it is leading.

Mr. Howell: Probably is.

Mr. Pendleton: He answered so quick I couldn't object I wish counsel would observe that, he objected so much to me.

The Court: Proceed.

Q. What is the effect in noise, or was, what was the effect in noise, was there any noise as the result of this slack being taken out.

Mr. Cutlip: We object to that now as leading and suggestive and immaterial.

115 The Court: Overruled.

Mr. Cutlip: Exception.

Q. Answer the question.

A. Nothing out of the ordinary, no, sir.

Q. Well, that is what I mean, is there ordinarily from the slowing up of cars as these were slowed up, any noise between the car?

A. Yes, sir.

Mr. Cutlip: We object to that as immaterial. Don't answer so quick. We ask that the witness be instructed not to answer so quick, in any other circumstances is immaterial.

The Court: Sustained.

Mr. Howell: Exception.

Q. Mr. Carney, will you please state the character of the noise, if there was any, made by the taking out of the slack in this cut of cars at the time the engine was slowed up.

A. Well it would be a kind of a chucking noise. Something like that, just the cars running out, you know, I can't express, hardly, what kind of a noise they would make.

Q. Is it a crashing noise.

Mr. Cutlip: We object to that as leading and suggestive.

Mr. Howell: I don't know whether the witness understands me. I want to get some definite idea of the noise.

Mr. Cutlip: He has not shown there was a noise there yet, we object to that as leading.

The Court: Mr. Carney, describe the noise there as best you can, the way it occurred to you at the time; tell the jury about it, how it sounded.

A. Well, I cannot tell you what kind of a noise I would call it, judge, but always,—it don't make any different—

Mr. Cutlip: What is this particular noise, what was this particular noise, is our objection.

116 The Court: Describe the particular noise at the particular time.

A. I don't understand you.

By Mr. Howell:

Q. Can't you describe what happened in regard to noise when this engine was slowed up, between the cars, from the taking out of the slack. You have stated that it was the ordinary noise, now what is the ordinary noise.

Mr. Cutlip: We object to that.

Q. That occurred at this time.

A. Well the ordinary noise is the chuckling or the rattle of the cars just running and the slack gradually takes out, a skreaking of the drawbars on the bar—I don't know what kind of a bar you call it underneath the draw bars, screaking.

Q. Is that noise noticeable or not?

Mr. Cutlip: Wait a minute. Objected to as leading.

Q. Or not.

.. Certainly.

Q. Now, Mr. Carney, when an engine or when this engine was slowed up how was the slack taken out. Just describe how that operated upon those cars.

A. The slack was taken out gradually, not suddenly, gradually.

Q. Explain what you mean by gradually?

A. Why, the engine, as I have stated before, never was absolutely stopped, I caused the cars to be slowed. I got my pin—the cars then gradually began drifting away from the cut he had a hold of on account of the engine slowing down, and I seen I had plenty of time to throw my switch.

Q. Wait a minute, that is not answering the question,

Mr. Cutlip: Wait a minute. The answer as far as he has gone we move to strike from the consideration of the jury.

Mr. Howell: We withdraw it.

Mr. Cutlip: Then direct the jury not to consider it.

117 The Court: The jury will not consider the answer to the last question.

Q. Mr. Carney, will you explain what you mean by the slack gradually taking up, by the gradual taking up of the slack, how it operates on each car, as in this case.

A. Well, they just gradually begin stopping by degrees.

Q. Each car gradually begins stopping, first the one next the engine.

A. First the one next the engine.

Q. Or the last one?

A. First the one next the engine.

Q. Then which car commences stopping next.

A. Following on, following on up.

Q. Then which one next.

Mr. Cutlip: Same objection.

The Court: Overruled.

Mr. Cutlip: Exception.

A. And goes the entire length of the cut.

Q. And the next follows that up, does it as the cars are slackened.

Mr. Cutlip: Objected to as leading.

Mr. Howell: Probably is.

Q. Mr. Carney, did you cut after the engine had slowed up, did you make the cut or uncouple the cars which you wanted to go upon switch track No. 10, did you uncouple them from the cars attached to the engine?

A. Yes, sir.

Q. Did they go on down switch track No. 10?

A. Yes, sir.

Q. Was there anything done in connection with the handling of these cars which was unusual and which you did not generally and ordinarily do.

Mr. Cutlip: Objected to as calling for a conclusion of the witness, incompetent, irrelevant and immaterial.

118 The Court: Sustained. That is the question for the jury in the light of all the testimony.

Q. Did you handle this cut of cars, on which Mr. Ward was riding, and which was going down switch track No. 10, in the usual ordinary way in which you handle such cars, and cuts of cars in the yards of Shawnee, with Mr. Ward?

Mr. Cutlip: We object to that now as incompetent, irrelevant and immaterial; and leading and calling for a conclusion of the witness. Now, Your Honor, —

The Court: You needn't discuss it. The objection will be overruled.

A. Yes, sir. Absolutely. Yes, sir.

Mr. Cutlip: Just a moment. He limited it to Shawnee.

Q. In Shawnee?

A. Yes, sir.

Mr. Cutlip: Give us an exception.

Q. Mr. Carney, you say you checked this list; you say you checked these cars, do you remember the number of the car, the last car in the cut on which Mr. Ward was riding.

A. 56643, Rock Island.

Q. Where was that car going to?

A. It was going to New Orleans by way of Alexandria, La.

Q. Where was it from?

A. Witchita, Kas.

Mr. Howell: Take the witness.

119 Cross-examination by Mr. Pendleton:

Q. Mr. Carney, about how many cars were left attached to the engine after Ward's cut had been uncoupled?

A. I believe I stated about 12.

Q. About twelve still left. After this whole train had been pulled over the hump or rise on the east side, where was the last car, the one Ward was on, with reference to this switch, lead switch that lead out from No. 10.

A. Just a few feet east of the wheels.

Q. Just far enough to miss the switch so you could turn the switch?

A. Yes, sir.

Q. That lead switch is it on the east or west of the hill—hump?

A. Well, about directly on top, that is my notion, right on top of the divide.

Q. How many cars of Ward's cut had got onto the switch from the main track when you pulled the pin and turned them loose.

A. How many had passed?

Q. Yes?

A. Towards No. 10?

Q. Yes?

A. Well, there must have been seven or eight or nine cars, somewhere along there.

Q. Seven or eight or nine?

A. Yes, sir.

Q. He had 11 all together?

A. Altogether.

Q. When when you made the cut you were some three or four car lengths down east of the switch.

A. I walked back to meet my cut.

Q. You walked back to meet your cut?

A. Yes, sir.

Q. Where were you when you gave the signal to the engineer to slow up, as you say?

A. Signal?

Q. Yes?

A. I was about two or three car lengths east of this switch on—

Q. Yes. How far from where you made the cut? Did you still walk eastward after you gave the signal before you made the cut?

120 A. Did I still walk eastward?

Q. Yes.

A. No, sir, I already had my cut, I didn't have my cut made, but was walking with my cut.

Q. When you gave the signal?

A. Yes, sir.

Q. You gave a signal for it to stop?

A. No, sir, I didn't say stop.

Q. Beg your pardon, No, you did not. You gave the signal to slow up?

A. Yes, sir.

Q. And after you gave the signal, then you pulled the pin?

A. Yes, sir.

Q. How is it that you can pull the pin after the signal is given. After the train slows up?

A. How is it.

Q. Yes, and the slack taken out.

A. I stated a while ago that I didn't think the slack was all taken out suddenly, I said the slack ran out gradually, which it did, and when the slack ran to its destination it came back gradually, and I pulled the pin.

Q. You did not pull it before you gave the signal?

A. No, sir.

Q. To slow up?

A. No, sir.

Q. Now, is it not a fact that when this slack is taken up it is all taken up at once?

A. No.

Q. How fast did you say this train was going?

A. When?

Q. At that time?

A. When I pulled the pin?

Q. Yes.

A. Do you want to know how fast it was going when I pulled the pin?

A. Yes, you said a while ago when—

A. When I pulled the pin? I have never been asked that question before.

Q. Yes, when you pulled the pin.

121 A. From two to three miles an hour.

Q. From two to three miles an hour?

A. Yes.

Q. Well was that normal, the ordinary, usual speed.

A. With that cut of cars, yes, sir.

Q. With that cut of cars. That is about the usual speed that you would cut them off, isn't it?

A. That amount of cars, yes, sir.

Q. Yes, sir. Well, you waited after you gave the signal to slow up, you waited until that retarding motion passed into the cut before you pulled the pin?

A. Yes, sir.

Q. Now, isn't there a way to make the cut on the rebound?

A. I explained that, when it came back.

Q. There is a little slack comes back a rebound?

A. Yes, sir.

Q. That occurs in every case whether they are going fast or slow?

A. Oh, no, it takes speed you know for the rebound, owing to the weight of the cut.

Q. Now, I believe you stated, didn't you, a while ago—did you state that Ward's cut was going at the rate of four or five miles an hour.

A. Before I slowed them down absolutely—

Q. Did you state that Ward's cut was going at the rate of four or five miles an hour before you slowed them down?

A. Yes, sir.

Q. Didn't you say just a minute ago it was going at the rate of two or three miles an hour?

A. When I pulled the pin.

Q. Well, did you slow up after you pulled the pin, could you slow up?

A. You mean Ward's cut.

Q. Yes, I mean Ward's cut?

A. No, sir.

Q. Well, how in the world is it you say Ward's was going four or five miles an hour at one time, and then you say it was only going two or three miles an hour?

122 A. I did not say that.

Q. What did you say.

Q. I said when I slowed the cars, caused the cars to be slowed down they were going at the rate of possibly four or five miles an hour, and when I pulled the pin they were slowed down to the rate of two or three miles an hour.

Q. Possibly at the rate of four or five miles an hour?

A. No, sir, two or three.

Q. I know. Two or three the last time, that was because they had been slowed up?

A. Yes, sir.

Q. You made the cut?

A. Yes, sir.

Q. You waited until then?

A. Yes, sir.

Q. Is four or five miles an hour rather above ordinary speed?

A. With that amount of cars, yes, sir.

Q. Yes. Too fast.

A. Yes, sir.

Q: How far had then gone. I believe you stated that about seven cars, seven or eight cars, seven or eight of the cars were over on the switch?

A. Seven or eight, something like that.

Q. And the first car, when they started, was just east of the switch?

A. Yes, sir.

Q. And the whole train then had moved some seven or eight cars in length. How long are those cars.

A. Well, they are different lengths.

Q. What sort of a proceed signal did you give to the engineer there.

A. Did I give to the engineer?

Q. Yes?

A. I did not give any direct to the engineer, because he was out of my sight.

Q. Didn't Mr. Houk down there carry the signal to—pass the signal?

A. Yes.

Q. What signal did you give to Houk?

A. Houk? A signal to proceed.

123 Q. Proceed signal?

A. Yes, sir.

Q. Well, he must have had to put on a good deal of steam to push that train back that fast in that length of time, didn't he?

A. He has to, necessarily he has to, yes, sir.

Q. Couldn't he have made that train go slower from the start, instead of making it go so fast?

A. Yes, he could.

Mr. Howell: We object as incompetent, irrelevant and immaterial.

The Court: The witness has answered the question. It is really immaterial.

Mr. Pendleton: It is very material to know the whole thing.

Mr. Howell: Not within the issues. Exception.

Q. But he was going at the rate of four or five miles an hour?

Mr. Howell: We object to that as repetition.

Mr. Pendleton: This is cross-examination.

Mr. Howell: He asked that question four or five times.

The Court: Objection overruled.

Mr. Pendleton: Counsel should not be so sensitive about such a thing.

Q. Now then, how long after you gave the signal to ease up before you made the cut? Just estimate.

A. How long?

Q. Yes, how far had the cars gone before you made the cut.

A. Oh, possibly seven or eight or ten car lengths.

Q. You walked along with them.

A. I walked along with them?

Q. Yes, with your cut?

A. I did when I came to my cut, when they came up to me, I walked along side of my cut.

Q. After you made the signal they had gone some eight or ten car lengths before you made the cut?

A. Yes, sir.

Q. When you gave the signal to ease up.

124 Q. I say when you gave this signal to ease up, how far did the train get then before you made the cut?

A. About a car length or so.

Q. About a car length or so?

A. Yes, sir.

Q. You made the cut. Well then that whole business, these twelve cars, on there, the slack was taken out of that whole string of cars in that time?

A. Yes, sir.

Q. Because you say the slack passed on, and in that length of time that slack had been taken up, that jerking motion had passed on to the 12th car and into Ward's cut before you made the cut.

A. I said a car length or two.

Q. You said a car length or two, Oh, do you think it was two?

A. Well I could not say.

Q. Well and when it did slow up when you made the cut, in that length of time it had got that speed in that length of time. When you made the cut, in say one or two car lengths it slowed up immediately to nearly half?

A. I said gradually.

Q. Well it slowed up to nearly half, you said it was down to two or three miles an hour when you made the cut.

A. I said possibly.

Q. Well, you aren't definite. And are you positive about anything you stated?

A. I have not said anything positive about the rate of these cars. I said possibly.

Q. You would not be positive. You were not positive then when you stated before it was going four or five miles an hour before you made the cut?

Mr. Howell: Objected to as argumentative.

The Court: Objection sustained.

Q. Well, are you positive then as to how fast the car was going before you made the cut?

125 A. No, sir, I have never said I was positive about the rate of in regard to the rate of speed of the cars at any time.

Q. You are giving your best judgment?

A. Yes, sir.

Q. Best to you. Your best judgment was it was going four or five miles an hour before you made the signal to ease up?

A. Yes, sir.

Q. And when you made the cut it was only going at the rate of two or three miles an hour?

A. Possibly, yes sir.

Q. That was your estimate?

A. Yes, sir.

Q. And in that length of time it slowed down that much?

A. It slackened down about, I judge two or three miles an hour.

Q. Now, you are acquainted with the rules of the company, are you?

A. I think so.

Q. What authority have you for running a switch yard, you say slack up when it suits you, as you say, when you think they are going to fast.

Mr. Howell: Object to that not within the issue. No allegation of his authority.

Q. Look, Mr. Carney, on these rules, (handing book) and see if you see any authority for slowing up, or an easy signal as you call it.

Mr. Roberts: We object, the rules are the best evidence.

The Court: Sustained.

Mr. Pendleton: Exception.

Q. Mr. Carney. That is a book of rules of the company?

A. Yes, sir.

Q. You go by that?

A. Yes, sir.

Mr. Pendleton: Did the court sustain that.

The Court: Yes, the objection to the question you put just a moment ago.

Mr. Cutlip: The rules are in evidence and they speak for themselves.

126 Q. How long have you been engaged in the switching business.

A. I think the correct dates are March 14, 1908, to—

Q. Have you examined, or do you know of the existence of a book upon railroad engineering written by William G. Raymond?

A. You say have I examined that book. Was I ever examined on that book.

Q. Have you examined the book?

Mr. Howell: Objected to as incompetent, irrelevant and immaterial. This witness is not offered as an expert.

Mr. Roberts: No questions asked if he was an expert. He has only been asked to describe the conditions surrounding this accident, and he is not offered as an expert.

The Court: Sustained.

Mr. Pendleton: Exception.

Q. Do you understand, Mr. Carney, the different systems of switching—railroad.

Mr. Roberts: Objected to as not proper cross-examination, asking about systems.

The Court: The court's recollection is that the witness testified about conditions in this yard, and the conditions that existed on the night of this accident, and he was not qualified—well, he did state the length of time he went into the service. My recollection is he did not qualify himself as an expert. What is your object with these questions.

Mr. Pendleton: I want to show what the system is, if he knows.

The Court: You can show it on rebuttal.

Mr. Pendleton: That have no right to object to their own witness not being an expert.

The Court: The court is of the opinion if they would offer him as an expert—

127 Mr. Howell: We have no reason to offer him as an expert, all we want is the facts in this case.

Q. I will ask you if this system of switching—

Mr. Pendleton: We except to the court's ruling there. Let me make a record,—

Q. (Resuming): —if this system of switching adopted in the yards of the Rock Island Railway at Shawnee is not what is called bill switching, that is it is with a switch engine drawing the train of cars—

A. I never heard tell of that before.

Q. You never heard tell of that before. You do the switching with a switch engine, don't you?

A. Yes, sir.

Q. You go down on one side of the grade and bring your cars over the grade and let gravity do a part of the work?

Mr. Howell: We do not believe these questions are directed to this period when the accident occurred. We object for the reason it is indefinite, and not directed to the occurrence, and not proper cross examination.

The Court: Sustained to the last question.

Mr. Pendleton: We except to that.

Q. Now, I will ask you if this is not the correct rule, for a system like they have there, and the only safe rule? I will read. And say if you don't know it is a fact:—

Mr. Roberts: May we ask before the rule is read—

Mr. Pendleton: I am asking him if it is a rule.

Mr. Roberts: We object to counsel calling it a rule, he is reading from a text book.

Mr. Pendleton: I am doing this as a part of my question.

(Whispered conversation between counsel and the court.)

Q. Mr. Carney, is it not a fact on this occasion when you made this cut that you miscalculated and failed to make the cut 128 in time before the slack from the engine was taken out.

A. No, sir.

Q. Wasn't it just a mistake of yours.

A. I answered the question.

Q. You deliberately waited gave the easy signal and waited for the slack to be taken up before you made the cut.

A. Shall I answer that?

The Court: Yes, sir.

A. I waited to protect that man there.

Mr. Cutlip: We object to what his object was.

Q. Did you do it, you deliberately waited.

Mr. Roberts: He asked him why he waited.

The Court: Sit down, all of you. He said he waited.

Q. What other cuts did you make on that after Ward was gone, did you make any other cuts there?

A. One more cut.

Q. Sir.

A. One more cut.

Q. How many cars?

A. One car.

Q. One car, did you make that before it got to the hump or afterwards?

A. It passed over the hump.

Q. It passed over the hump? Now then the train continued, it did not stop, but after Ward's cut was made they kept on pushing the train over until you cut this car loose. Yes, because when you cut off Ward's cut, the end of the balance, of the remainder of the cars hadn't got to the top of the hill?

A. Hadn't got to the switch.

Q. Had not got to the switch, so the train continued over. As soon as Ward's cut passed out of the way, while the cars were coming on did you then hasten and change the switch to let the car go in another direction.

A. Back to the main line.

Q. You afterwards cut that away, and before you made the other cut you hastened and changed the switch?

129 A. Yes, sir.

Q. Without stopping the train at all made the cut?

A. Yes, sir.

Q. There was no stopping of the train between?

A. No, sir, not until I made the second cut.

Q. Isn't it a fact that you wanted to make the one cut and save the time of making two cuts at once, and you didn't think of any harm happening and wanted to make two cuts on one push.

A. Not after he had been warned.

Q. Not after he had been warned. What do you mean by that.

A. I warned him to look out. We had a heavy cut.

Q. Isn't it a fact you were doing it for your own convenience, to make two cuts instead of one on one push of the cars.

A. My own convenience?

Q. Yes.

A. I don't understand the object of the question.

Q. Read the question.

(Question read.)

A. My own convenience? Not necessarily. I saw the—saw the proposition in front of me, that I could do such a thing that I had my mind made up to; not necessarily to protect myself. No.

Q. You did not?

A. No, sir.

Q. Now isn't it the custom. Isn't it usual for you to make one cut, for the train to stop, and give you time to turn your switch and then make another cut?

A. No, sir.

Q. That is not your custom at least.

A. No, nor anybody else's.

Mr. Roberts: Objected calling for a question not pleaded, and not within the issues in this case.

The Court: Overruled.

Mr. Roberts: Exception.

130 Q. After this was done and this plaintiff was hurt, there was an inquiry made into this, was there, by the railroad company.

Mr. Howe: We object as not proper cross examination. Incompetent, irrelevant and immaterial.

Mr. Pendleton: Preliminary question leading up. He made statements. He is one of the defendants anyhow. And if they are going to object to everything I can't get along.

The Court: Overruled.

Mr. Howell: Exception.

Q. There was an inquiry made into this business.

A. In regard to Mr. Ward's injury?

Q. Yes?

A. Yes.

Q. And you made a statement to the company?

A. I think so. Yes.

Q. Did you make a statement to the company just as you stated it here substantially?

A. I was not asked the questions I was asked here by the company.

Q. Well, as far as you went?

A. I stated everything as near the fact as I possibly could.

Q. Since you stated it here?

A. No, sir.

Q. Have you a copy of that statement here?

A. No, sir.

Mr. Pendleton: We would like to have a copy?

Q. Well did you tell them there that you had given the easy signal, and then afterwards had pulled the pin.

A. I could not say. It has been so long.

Q. Anyhow, after you made that statement you were suspended were you not, or discharged from the service of the company?

Mr. Howell: Objected to as incompetent, irrelevant and immaterial, prejudicial and in no way connected with the issues in this case.

131 Mr. Pendleton: It goes further than that. It goes to his credibility.

The Court: Objection overruled.

Mr. Howell: Exception.

Q. You were discharged, were you not.

Mr. Roberts: Just a moment, will the court indicate on that theory it is competent.

The Court: The only theory on which the court thinks it would be competent would be to test the good faith now of this witness.

Mr. Howell: He has asked whether or not he made some statements made the same statements that he did here, and he has said he did.

The Court: The probability is if that statement is in writing that would be the best evidence.

Mr. Pendleton: We have asked for it, and never did get it.

Q. Read the question.

(Question read.)

The Court: Answer that by yes or no, Mr. Carney.

A. Read the question before that.

(Question read.)

Mr. Roberts: May I suggest this to the court before the witness answers. That the question be limited to this particular accident. If he was subsequently discharged for another cause——

The Court: Yes, sir.

Mr. Roberts: And I think we are entitled to have the question limited.

The Court: You are entitled to have the question put fairly so it would limit it to this particular act.

Mr. Roberts: Then we have no objection.

Mr. Pendleton: The witness can take care of himself.

The Court: The way the question is put it is too indefinite.

132 Reform it. Objection sustained.

Mr. Pendleton: Yes, sir, Objection sustained, in that form.

Q. If you had made—after you had made these statements, how soon after—just wipe that out. How soon after this accident where Mr. Ward was hurt was it you made your statement to the company?

A. About three or four hours.

Q. Two or three hours. After that were you discharged or suspended from the service of the company on account of this?

A. No, sir.

Q. Was there any other reason you were suspended than this?

A. For a failure——

Mr. Roberts: If the court please. We object to that as incompetent, irrelevant and immaterial; nothing to do with the issues in this case.

Mr. Pendleton: I want to show it was—

The Court: Objection sustained. You can show it by your evidence in rebuttal.

Mr. Pendleton: I have to show it before.

The Court: He says he was not discharged on account of this accident. If you have evidence on your side you could put it on and prove he was.

Mr. Pendleton: That is allowing him to be the arbiter of his own case, I can cross examine him. I want to inquire, he says it is for something else, I want to cross examine him on that particular point, because I know, I immediately know he was discharged for this reason and I think I can prove it by the—

The Court: The court has given you great latitude in permitting you to ask that question and the court has grave doubts in his mind if it is not error to have answer at all. Now, if you can show 133 his statements were wrong, that he was discharged, you will have ample opportunity.

Mr. Pendleton: Have to get it out of the railroad, might as well get it out of him. Make the record.

Q. What were you discharged for.

Mr. Howell: Objected to as incompetent, irrelevant and immaterial, not within the issues of this case.

The Court: Sustained.

Mr. Pendleton: We except.

Q. Didn't you state on a certain date during the summer of 1914, I am not able to give the precise date, to Judge Reason, in the presence of Earl Ward, in Judge Reason's office in substance this: That you lost your job on account of this Ward business, and that you could not get it back unless you would swear to a lie for the company? In substance?

A. No, sir, Absolutely.

Q. You made no statement?

A. No, sir.

Q. Of that kind?

A. No, sir. No, sir.

Q. Didn't you meet me on the street here last summer about that same time, in the street on Broadway, at out a little bit in front of De Graff's store and tell me in substance that the company was giving you the worst of it on this Ward case, and that they wanted you to swear to something that you would not swear, that you would not swear a lie for anybody, and could not get your job back?

A. What time?

Q. Last summer.

A. I cannot state the date whenever any such conversation as that occurred between me and Judge Pendleton.

Q. You don't remember any such conversation?

A. No, sir, I do not.

Mr. Pendleton: I believe that is all.

134 Redirect examination by Mr. Howell:

Q. When you made the uncoupling and let the eleven cars which Mr. Ward was to take to track No. 10, after you made that cut, you put the switch back, so the cars would run on the main line?

A. After?

Q. Yes?

A. Yes, sir.

Q. Yes. Before—kill that.

Q. Then all the eleven cars of the cut of Mr. Ward's had passed over the switch before the other cars and the engine got to the place where they would have to pass on that switch and go onto the main line?

A. Yes, sir.

Q. In that time, you say, in your estimate the cars were running at the rate of two or three miles an hour?

A. Yes, sir.

Q. You were asked about a conversation with Mr. Reasor. Did you have a conversation in his office in the presence of Earl Ward.

A. The only time that I ever heard or was in Reasor's office was with Earl Ward in regard to being garnisheed. I had no part in it whatever, and made no statement there in front of Judge Reason or Earl Ward in regard to nothing. I went up there by his solicitation, as to what Judge Reasor would have to do in his case as to why he was taken out of the service for being garnisheed.

Q. I believe that is all.

Judge Pendleton: That is all.

135 Redirect examination by Mr. Howell:

Q. Earl Ward is the brother of this Mr. Ward here?

A. I believe so.

Mr. Cutlip: Move to strike that out.

Mr. Howell: That is all.

Mr. Pendleton:

Q. Wait a minute, Mr. Carney, come around again please sir.

The Court: Mr. Carney recalled.

Mr. Pendleton: By the plaintiff.

Mr. Pendleton:

Q. You were present at the last trial, Mr. Carney, when was that trial? September or October, last fall, when the trial was had here, were you?

A. This same trial?

Q. As a witness, yes, sir.

A. Yes, sir.

Q. How long before that trial was it that you were reinstated, you were then working for the company?

A. Oh, I had been reinstated possibly six or seven months for—

I had been here in town—I was out of the state, out of the town. Out of Shawnee for possibly three or four months.

Q. During the whole spring or summer.

A. During the—Oh, no not during the whole spring or summer.

Q. Off and on?

A. I was out of here three months at one time.

Q. How many days were you working for the Rock Island before this trial came up.

Mr. Howell: Objected to as incompetent, irrelevant and immaterial, nothing to do with the issue in this case.

Mr. Pendleton: It has.

The Court: Objection overruled.

Mr. Howell: Exception.

136 A. I could not say, I don't know how many months.

Q. Well, can you approximate it, just guess.

A. Oh, possibly sixty days, something around there I think, I am not positive.

Q. Don't you know you had been reinstated not over two weeks?

A. Oh, Well—

Q. What? That is all.

Witness excused.

137 WILLIAM RUSSELL, called as a witness in behalf of the defendants, being first duly sworn, was examined in chief by Mr. Howell, and testified as follows:

Q. State your name.

A. William Russell.

Q. Where do you live, Mr. Russell?

A. 507 North Louisa, Shawnee.

Q. How long have you lived in Shawnee?

A. Well, I have lived off and on for about four or five years.

Q. Are you an employee of the Rock Island Railway Company?

A. Yes, sir.

Q. What is your business?

A. Locomotive engineer.

Q. Were you working for the company in December, 1913?

A. Yes, sir.

Q. Do you know Fred Ward?

A. Yes, sir, I know him.

Q. Plaintiff here. You know A. J. Carney?

A. Yes, sir.

Q. What position did Fred Ward have with the Rock Island Company in the yard at Shawnee, if any, in the month of December, 1913?

A. He was switchman.

Q. What position did A. J. Carney have at that time.

A. He was switchman too, foreman of the engine.

Q. What position did you have at that time?

A. I was running a switch-engine.

Q. You ran the switch engine?

A. Yes, sir.

Q. Who was your fireman?

A. George Sparks.

Q. Do you remember the occasion when Fred Ward fell off the end of the box car in the yards?

A. Yes, sir.

Q. Were you handling the engine that night?

A. Yes, sir.

Q. What train were you working on with your switch engine?

A. 92, I suppose was the train.

Q. Where had that come from; the east or west?

138 A. It came from the west.

Q. Where was it standing when you ran your switch engine down there?

A. I think to the best of my recollection it was pulled up on the main line, I would not say positively.

Q. Did you pull a cut of cars or a number of cars of about 22, a part of the cars which made up train 92 back east on the main line?

A. Yes, sir.

Q. On that night?

A. Yes, sir.

Q. Where were those cars put, if you remember?

A. Well, they were pulled up over the lead switch and shoved in on the south side some place, I could not say where they went.

Q. Was Mr. Ward on that crew? that night?

A. He was there working at the time it happened, I could not tell where he was at.

Q. You remember taking that cut of 22 cars.

A. Yes, sir. I would not say there was 22, I will say there was between 18 and 20 cars, something like that.

Q. You didn't count them?

A. No, sir.

Q. How many cars were put on switch No. 10.

A. Well, it would amount to I suppose eight or ten or twelve cars.

Q. Not all the cars you had were put on track No. 10?

A. No, sir, some of them were put on the main line.

Q. What is the condition of the yard as to having a hump in it where this switch head is leading off to 10?

A. Well, there is a hump in the yard along where that switch is at, there is a grade this way and that.

Q. What kind of a hump is it.

A. Kind of a little hill like, a person would say the switch was on top of the hill.

Q. Just a rise?

A. Yes, sir.

139 Q. Grade is down towards the east and towards the west?

A. Grade is down toward the east and toward the west, yes sir; that is the condition of the yard.

Q. Did you get any signal to take the cars back—of this cut—into the switch head there into No. 10 that night.

A. Well sir, I don't think after I pulled off the main line.
Q. They gave a proceed signal—

A. —I don't think I backed up.

Q. How was your engine facing?

A. It was headed west.

Q. Then you would proceed, would you?

A. Yes, sir, proceed.

Q. Your engine facing west, towards the way the cars were going?

A. Yes, sir.

Q. Did you stop or slow down the engine between that time and the time the cars which were set off on No. 10 were cut loose?

A. Yes, sir, I slowed down the cut of cars I had a hold of; slowed them down, eighteen or twenty cars.

Q. Then where did your engine go with the rest of the cars.

A. I think after that we put some of them down on the main line, and I could not say where those did go, they might have put them on the south side or might have took some of them down on the north side, I could not say.

Q. About how many cars of this cut that you had a hold of with your engine at that time were over on the road towards switch No. 10 when you slowed down your engine.

A. Well, I would judge about half of them. Something like that. Something near half. I could not say, being night time a man could not judge accurate.

140 Q. About how fast were you going, Mr. Russell, if you remember at the time you slowed down?

A. When I got an easy signal to slow down I must have been going six or seven miles an hour, something like that.

Q. How slow did you slow down to?

A. Well I slowed them right down to where they could cut them off, I suppose about three or four miles an hour, I suppose something like that.

Q. Was there anything, Mr. Russell, done in the handling of the cars that night that you were a putting that cut of cars on switch No. 10 that was not usual and ordinary?

A. No, sir.

Q. Done in the usual and ordinary manner?

A. Yes, sir.

Q. When you slowed down your engine, what effect, if any, did that have upon the checking of the cars which you had in front of your engine towards the west?

A. Well, it would take the slack out of the cars I had a hold of when I slowed down.

Q. Would that result in any disturbance between the cars, any disturbance or noise or anything like that.

A. Well, you would notice the slack running out of them.

Q. What kind of a noise is that.

Q. Well, you couldn't hardly explain what kind of a noise, kind of a racket, you know, the slackening of iron, four or five inches of slack between each car, I could not say, something like that.

Q. Is that noise made by the slackening up of the cars noticeable.

A. Well, I suppose a person would notice it being going by, anything like that; might.

Q. Well, you slowed up the engine. When you slow up an engine, Mr. Russell, when you slowed up this engine attached 141 to this bunch of cars, where was the effect of the slowing up, how did it operate upon the cars, upon the cars next to your engine first, or upon the rear car of the cut.

A. Well, it affects all of them, the further away from the car there would be more slack.

Q. I know, but which car slacks up first?

A. Next to the engine.

Q. Which one next?

A. The next, and keeps on going until the slack gets out of all of them.

Q. Gradual checking of each car?

A. Yes, sir.

Mr. Howell: Take the witness.

Cross-examination by Mr. Pendleton:

Q. Mr. Russell, how far had the cars gone on your proceed signal when you got the other signal, the next signal?

A. Well, I don't—let's see, now, I could tell—

Q. About how many car lengths?

A. I would judge seven or eight, something like that I was around the curve.

Q. Some seven or eight or ten?

A. Some seven or eight or ten, I would say; night time, you could not see, but I would say some seven or eight or ten cars, something like that.

Q. Now, what signal did you receive?

A. Well—

Q. After the proceed signal, what would be the next signal you received?

Q. Well, we got what is termed an easy signal or slow down signal.

Q. "Termed," who terms it that?

A. Who turns the slow down signal, did you say?

Q. Yes.

A. Well, don't know, sir, who turns it, or whether it is given, same signal as a stop signal.

142 Q. Rule—the rule given is a stop signal.

Q. Yes, sir, it is something the same as a stop signal, I suppose it would be the same thing.

Q. How do they give it, a little bit slower?

A. A little bit slower, I should judge.

Q. So you distinguish between the stop signal and the easy signal by the manner in which it is done?

A. Yes, sir.

Q. The swing is the same?

Q. It is virtually the same thing, but a man would not stop as

quick, maybe slow down, maybe to slow down a car, it is virtually a stop signal, if a man got no other signal he would eventually stop.

Q. He would eventually stop on that?

A. Yes, sir.

Q. Sometimes he stops at once and sometimes——

Mr. Howell: Object to that as incompetent, irrelevant and immaterial, not within the issues.

The Court: Overruled.

Mr. Howell: Exception. Not proper cross-examination.

Q. Where was Mr. Carney when he gave you this signal?

A. I did not get the signal from Mr. Carney, I got it from the man following the engine, I believe Mr. Houk.

Q. On top?

A. Yes, sir.

Q. Where was he, how far back?

A. He was on top of the cars, I would not say, maybe the first, second or fourth car, I would not say.

Q. You looked to him for the signal?

A. Yes, sir.

Q. And you slowed up in obedience to that signal?

A. Yes, sir.

Q. Did you put on the brakes?

A. Yes, sir.

Q. Engine ceased to exhaust, didn't it?

A. Yes, I had shut the engine off before that.

Q. You had shut the engine off before you got the signal then?

143 A. Yes, sir. I shut the engine off before I got the signal.

Q. It was going of its own motion?

A. Yes, sir, after you get the cars going around the curve, with the hump on the track, the hump will eventually get the cars in far enough.

Q. And when you got the signal you put on the brakes?

A. Yes, sir.

Q. And how slow did you say you brought it down to?

A. Well, I would not be positive, say something like three or four miles an hour, something like that.

Q. You cut it down about how far then, about half?

A. Yes, something like that.

Q. Well, how many cars, I believe you say it went seven or eight car lengths before you began to slow down?

A. Something like that. I would not be positive.

Q. Yes, and in that time, the time they went seven or eight car lengths you got the speed of six or seven miles an hour, you say?

A. Yes, sir.

Q. Is that a natural speed or rather too much, rather too fast?

Mr. Howell: Objected to as immaterial and not within the issues.

The Court: Objection sustained. It has been objected to by both sides I think, though, probably.

Mr. Pendleton: It is immaterial, the whole business is immaterial. The Court: I think it is too, but both sides objected. Well, go ahead.

Q. Mr. Russell, it took a good deal of steam to get up that speed in that length of time, didn't it?

A. Well, it is not such a stiff grade. Of course a man with that amount of cars will use a good deal of steam.

144 Q. It was a long train?
A. Eighteen or twenty cars.

Q. And you pushed them up to a speed of seven or eight miles an hour in six or seven car lengths?

A. Or ten.

Q. Or ten. You are certain about that?

A. No, I am not certain; something like that; the cars were not very heavy; they were merchandise cars, I suppose.

Q. You could not see Mr. Carney to see when he made the coupling?

A. No, I could not. I was around the curve. Mr. Houk was the man I got the signal of.

Q. The signal you received was the same as the stop signal shown there (exhibiting rule book), only you understood it was a slow up a slow stop easy signal you call it?

A. Something like that.

Q. Yes, that is all.

Mr. Howell: That is all.

— MARCH, called as a witness in behalf of the plaintiff, having been duly sworn, was examined in chief by Mr. Howell, and testified as follows:

Q. Mr. March, you have been on the stand before?

A. Yes, sir.

Q. In this case?

A. Yes, sir.

Q. For the plaintiff?

A. Yes, sir.

Q. You are car inspector and were car inspector for the Rock Island in December, 1913?

A. Yes, sir.

Q. Did you examine the car off of which Mr. Ward fell on the night of December 10, 1913?

A. Yes, sir.

Q. Was that a part of your duty?

A. Yes, sir. We have a report, make out an accident report.

Q. Was that a part of your duty to inspect those cars?

145 A. Yes, sir.

Q. What was the number of that car, do you remember?

A. 56643m I believe.

Q. What was the initial?

A. Rock Island C. R. I. & P.



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Q. C—

A. C. R. I. & P. Yes, that is the number (witness refers to memorandum).

Q. What was the condition of the car you found with reference to equipment, brakes and so forth.

A. They were in good condition.

Mr. Pendleton: Wait a moment. We object to that as incompetent, irrelevant and immaterial, and because it is not competent to—does not tend to prove any issue in this case.

The Court: Is there any allegation to that effect.

Mr. Pendleton: No, sir.

The Court: If there is it would be competent evidence.

Mr. Pendleton: We have not made any allegations; we don't raise the issue.

Mr. Roberts: We are trying to find out—

The Court: I will overrule the objection if you are not certain what the issues are.

Q. You got the answer, Mr. Stenographer.

Stenographer: Yes "In good condition."

(Answer read.)

Mr. Cutlip: Give us an exception to the ruling of the court.

Q. What was the distance of the rear brake above the car on the rear end of car No. 56643. I will ask you whether or not that brake stem was standard according to the Interstate Commerce Commission rule?

A. It was within their rule, yes, sir.

Mr. Pendleton: Objected to as incompetent, irrelevant and immaterial. No issue?

A. It covered the requirements.

The Court: If counsel cannot agree—

146 Mr. Pendleton: We do agree there is no question raised in our petition and under their answer.

The Court: Then the objection will be sustained and the answer stricken.

Mr. Howell: On their admission.

Mr. Pendleton: We don't make any admission.

Mr. Howell: Exception.

Q. How high was the brake.

Mr. Roberts: To make it clear let us make our offer to prove.

The Court: Yes, sir. Do you allege faulty appliances or bad cars?

Mr. Cutlip: No, sir.

Mr. Howell: No, but they have attempted to show the height, that it was so low that he got thrown off in evidence, and we want to show it was standard. That is why we offer the evidence.

The Court: You may ask that.

Mr. Howell: That is what I asked him. I asked him if they were standard according to the Inter State Commerce Commission rules.

The Court: What do you want to prove? Make your offer.

And thereupon Mr. Roberts, dictated the following offer into the record out of the hearing of the jury.

Mr. Roberts: Comes now the defendant and offers to prove by the witness, March, inspector, inspector for the C., R. I. & P. Ry. Co., that the car, C., R. I. & P. 56643 was without defect and conformed to the standard established by the Interstate Commerce Commission for cars used in Interstate commerce, and that there were no defects in the other cars being handled by the plaintiff in this case at the time of his alleged accident.

Mr. Cutlip: To which offer the plaintiff objects for the reason the same is incompetent, irrelevant and immaterial and not 147 within the issues framed in this case.

The Court: Objection sustained.

Mr. Roberts: That is all. Take the witness.

No cross examination.

The Court: Call the next witness.

148 Dr. F. L. CARSON called as a witness in behalf of the defendants, being first duly sworn, was examined in chief by Mr. Howell, and testified as follows:

Q. State your name?

A. F. L. Carson.

Q. Where do you live, Doctor?

A. Shawnee, Oklahoma.

Q. Are you a practicing physician?

A. Yes, sir.

Q. Under the law been licensed under the laws of the state of Oklahoma?

A. Yes, sir.

Q. How long have you practiced in Shawnee?

A. About 9 years.

Q. Graduate of any medical college?

A. Yes, sir.

Q. Which one?

A. Toulaime University.

Q. Had any other course.

A. I was an interne in the hospital, post graduate work.

Q. Do you know Fred Ward, Doctor?

A. Yes, sir.

Q. Did you ever make an examination of him?

A. Yes, sir.

Q. When was your examination made, Doctor?

A. Oh, I think January 9, last year.

Q. January 9, 1914?

A. Yes, sir.

Q. Where was the examination made, Doctor?

A. In Dr. Blickensderfer's office.

A. I wish you would state what you found; what physical evidences you found of any abnormal condition at the time you made the examination.

A. Visible evidences?

Q. Yes?

A. There was none except a breaking down of the arch of the foot.

Q. Did you examine both of his feet at that time?

A. Yes, sir.

149 Q. Examine the left foot?

A. Yes, sir.

Q. Examine the right foot?

A. Yes, sir.

Q. Was there any difference between them at that time.

A. I believe the condition in the left foot was more marked.

Q. What condition was that?

A. The condition we call flat-foot.

Q. Flat foot?

A. Yes, sir.

Q. Is that condition common or an infrequent one.

A. It is rather common.

Q. Rather common?

A. Yes, sir.

Q. Doctor, when you have flat foot, what does that mean, just explain to the jury.

A. Flat foot, it is a breaking down of the normal arch of the foot that in people normally, until there is no arch until it is flat.

Q. In the normal foot this arch is held up by the muscles, and ligaments and tendons?

A. By the ligaments and bone, yes, sir.

Q. When the arch breaks down—the arch is composed of bone, is it not?

A. Yes, sir.

Q. When that breaks down that stretches the ligaments, does it not?

A. Yes, sir.

Q. Tendons. Then in flat foot; this condition you found in the left foot and also in the right foot—

A. Yes, sir.

Mr. Cutlip: We object as leading and suggestive.

Q. I will ask you—I am asking whether he did or not.

Mr. Cutlip: Let's hear that question.
(Question read.)

Q. Withdraw the question. State whether or not, Doctor, you found that condition of flat foot, that is, the stretching of the ligaments and the falling of the bones forming the arch in the right foot and also in the left foot?

A. Yes, sir.

150 Q. Doctor, is there necessarily a stretching or lengthening of the ligaments or tendons holding up the bones forming the arch of the foot in order to have flat foot?

Mr. Cutlip: We object to that as leading, again.

The Court: Yes, it is leading, sustained for that reason.

Mr. Howell: Exception.

Q. Doctor, when you have flat foot such as you found in Mr. Ward's feet, case, what effect or what causes that flat foot with reference to the lengthening of the tendons and ligaments supporting the bones in the arch of the feet.

Mr. Cutlip: We object to that now.

The Court: The question is very complicated. Objection overruled.

A. You would commonly get it.

Q. When you have flat foot what is the condition of the ligaments and tendons in the feet supporting the arch?

Mr. Cutlip: We object to that as leading and suggestive. If he knows? He has not qualified himself to answer.

Q. If you know, of course, don't answer it unless you do know.

A. Objection overruled?

The Court: Yes, sir.

Mr. Cutlip: Give us an exception.

A. The ligaments are relaxed, necessarily or there would be no descent of the arch.

Q. Explain what you mean by the "descent of the arch."

A. There would be no breaking down of the arch if the ligaments were intact; if they were not stretched there could be no flat foot.

Q. Now, Doctor, when you made this examination in January, 1914, did you find any evidence of any permanent injury?

A. Found no evidence of any injury at all: That is no 151 evidence of injury other than flat foot. I guess that is permanent. Whether it is caused by injury or not, I do not know.

Mr. Cutlip: How is that.

A. I say I found flat foot, it is probably permanent, but with no external evidence of any injury.

Q. The flat foot is permanent?

A. Yes, sir.

Q. And that is in the left foot and also in the right foot?

A. Yes, sir.

Q. Doctor, does flat feet keep a man from doing manual labor?

Mr. Cutlip: We object to that as leading.

The Court: Yes, objection sustained.

Mr. Howell: Exception.

Q. What effect, Doctor, with reference to doing manual labor has flat foot upon a man?

Mr. Pendleton: If you know.

Q. Oh well, if you know, if you insist.

A. Well it differs with different individuals. You may find some individuals with flat foot that are able to perform manual labor with out difficulty, others that do so with great difficulty or not at all on account of the pain.

Q. Now, with reference to Mr. Ward, taking his condition of flat foot what effect does that have on his ability, in your opinion, to do manual labor.

Mr. Cutlip: Objected to as calling for an opinion out of the range of expert testimony.

The Court: Overruled.

Mr. Cutlip: Exception.

A. I could not say with just one examination as to the amount of pain suffered by Mr. Ward as the result of that flat foot.

Q. At the time you made the examination, Doctor, did 152 you find any bruised condition of the feet?

A. No, sir, I did not.

152 Q. None whatever, could you state from your examination that this flat foot had been existing or had been caused by any injury?

A. No, sir.

Mr. Cutlip: We object to that as leading and suggestive.

Mr. Howell: Take the witness.

The Court: He said he could not.

Cross-examination by Mr. Pendleton:

Q. Doctor, at whose instance were you called in.

A. Dr. Blickensderfer?

Q. Dr. Blickensderfer?

A. Yes, sir.

Q. He is the regular physician for the defendant company?

A. I believe he is.

Q. Rock Island, and you understood when you were called in that you were performing this service for the company?

A. I did, yes, sir.

Q. And you were paid for these services by the company.

A. Yes, sir.

Q. That is all.

(Witness leaves the stand.)

Q. Come back, Doctor.

A. I thought you said that was all, I beg your pardon.

Q. Doctor, you say flat foot is caused by the stretching or the relaxation of the ligaments?

A. Yes, sir.

Q. If a man is born with a flat foot then he is born with a relaxed limb?

A. Yes, sir.

Q. That is the point. They are born with flat foot are they not?

A. Sometimes, yes, sir.

Q. Well is there anything to prevent these ligaments from being,—well—more relaxed by being twisted or sprained. A man with the flat foot can have the ligaments sprained and torn just the same as any other kind of a foot?

153 A. Yes, sir.

Q. There are a considerable number of people that have flat foot?

A. Yes, sir.

Q. Did you examine the plaintiff's hip at the time?

A. Yes, sir.

Q. He complained about pain at the hip joint, did he not?

A. He did.

Q. Did you find anything wrong there?

A. There was nothing we could see wrong.

Q. But from the feeling and from his actions did you find anything there.

A. What he stated?

Q. Yes, from what he stated and what you found out yourself?

A. Yes, he suffered pain on flexing the limb about thirty degrees, about that way (indicating).

Q. Yes, sir. He suffered pain?

A. Yes, sir.

Q. You moved his—

A. Yes, sir, he suffered no pain when it was out straight as I recollect.

Q. Did you understand that pain was from the injury he received?

A. Yes, sir.

Mr. Pendleton: I believe that is all.

Redirect examination by Mr. Howell:

Q. Doctor, from your examination, you did not see anything wrong with the hip.

A. There was nothing objectively to discover.

Q. There was nothing objectively to discover what was the cause of the pain in his hip, if he had any, except that he stated—

A. I could not say except from his history that I got from him.

Q. Well, Doctor, was there any condition in his hip or left 154 foot from which there would be pain in the leg and hip.

Q. Yes, he might suffer pain in the leg and hip from the result of flat foot, but I don't think it would be elicited by motion.

Q. What in your opinion was the cause of the pain?

A. I don't know.

Q. You don't know?

A. No, sir.

That is all.

Dr. E. E. RICE, called as a witness in behalf of the defendants, being first duly sworn, was examined in chief by Mr. Howell, and testified as follows:

Q. State your name?

A. E. E. Rice.

Q. You are a practising physician in Shawnee, Doctor?

A. Yes, sir.

Q. How long have you been practising here?

A. Fourteen years.

Q. Graduate of any—

Mr. Pendleton: We admit the Doctor is qualified.

Q. You do?

Q. Doctor do you know Fred Ward, the plaintiff in this case?

A. Yes, sir.

Q. Did you ever make any examination of his feet?

A. Yes, sir.

Q. When was it Doctor?

A. The first time was on February 16, 1914.

Q. When was the second time?

A. April 9, 1914.

155 Q. Doctor, what visible evidence of injury did you find, or abnormal conditions in Mr. Ward's feet, or left foot at the time you made the first examination.

Q. There was a thickening of the soft tissues on the top of the instep of the left foot, in that region (indicating).

Q. Is that the only thing you found?

A. Yes, sir.

Q. What was the condition of his right foot, if you examined it?

A. Nothing except the normal condition, with the exception of flat foot. Both his feet are flat.

Q. Both his feet were flat?

A. Yes, but no evidence of any injury on his right foot.

Q. Now, this thickening of tissue, where was that.

A. Right over the instep.

Q. Right over the instep.

A. Yes, sir, on the junction of the toe bones with the foot bones, of the tarsal and meta tarsal.

Q. From the examination there, Doctor, what in your opinion, or would in your opinion the condition—the thickening of the tissue be permanent or temporary.

A. There was a thickening of the soft tissues, that is temporary.

Q. Temporary. Did you find outside of the flat foot that you found in both feet, did you find any permanent condition of injury or damage to his feet.

A. No, sir.

Take the witness.

Cross-examination by Mr. Pendleton:

Q. Doctor, you were summoned at whose instance to assist in this matter.

A. Dr. Blickensderfer called me to see the case.

156 Q. He was the regular railroad physician?

A. Yes, sir.

Q. Rock Island. When you were performing this service you understood it was for the Rock Island Company?

A. Yes, sir.

Q. And you have been paid for those services?

A. Yes, sir.

Q. Doctor, did you see any evidences that the plaintiff, Mr. Ward was suffering any pain at the time you were called?

A. No, sir.

Q. You feel sure of that?

A. Pretty sure.

Q. Didn't you testify on the trial here before?

A. That I saw evidence of suffering pain?

Q. Wait, didn't you testify on the trial before?

A. Yes, sir, I testified.

Q. Didn't you state that you found Mr. Ward suffering considerable pain?

A. No, sir.

Q. And did Mr. Howell raise the question with you?

A. That Mr. Ward was suffering pain at that time?

Q. Yes, sir.

A. There was something asked in regard to that.

Q. You did not state that. Call Mr. Sam Gill, let him bring the record here.

The Court: Proceed.

Mr. Pendleton: I want that record for cross-examination.

The Court: Do you want to put an impeaching question.

Mr. Pendleton: Yes, sir, I want to read the question to him if we can get it in time.

Q. Well, Doctor, if any of the other ligaments had been strained in the foot besides the "stiffening" that you speak of here, what effect would that have had.

A. There may or may not be thickening at this time. This was several months after the acute injury, the injury.

Q. What effect would that have upon the ligaments, they may have been torn.

157 A. They may have returned to their normal condition. He was hurt on December 10, 1913, and I saw him February, 1914, that would give long enough time for the tissues to return to their normal condition.

Q. Does that give long enough time for a strained ligament to get well?

A. Yes, sir, very likely, but they were not on top of the foot.

Q. Oftentimes they do not get well?

A. I think in a sprain they always get well.
 Q. How long does it take, though.
 A. Depends on how much they use the foot.
 Q. Months or years.
 A. I should say if a strain did not get well in six weeks, it was something more than a strain, an injury to hard parts.
 Q. Wouldn't you say that the ligaments had been strained so badly that they could not recover?
 A. No, I should not say.
 Q. Is there such a thing as the ligaments torn loose from the bone?
 A. Yes, sir.
 Q. And if the ligaments are torn loose from the bone and they did not heal there would be trouble all the time?
 A. Yes, sir.

That is all Doctor. Wait a minute, is Mr. Gill here?

Redirect examination by Mr. Howell:

Q. Doctor, did you see an ex-ray picture of Mr. Ward's foot?
 A. Yes, sir.
 Q. Was there any fracture of the hard parts?
 A. No, sir.

Mr. Cutlip: We object to that as incompetent, irrelevant and immaterial, not proper redirect examination.

The Court: Sustained.

Mr. Howell: We will ask leave of court to ask the question on direct examination.

158 The Court: You may ask it on direct.

Q. Read the question. (Question read, to-wit:) "Was there any fracture of the hard parts?"

Mr. Cutlip: Same objection.

The Court: Objection sustained.

Mr. Howell: On what theory.

The Court: On the theory he cannot testify to what the ex-ray picture showed, the Ex-ray picture itself is the best evidence.

Mr. Howell: Give me an exception. We think an ex-ray picture is such that it requires explanation as to what it shows or does not show, by expert testimony.

Q. Doctor, will you wait a few minutes. I will have to show the ex-ray picture, that is all right now.

Call in Dr. Blickensderfer.

Witness excused.

Dr. CHARLES BLICKENSDERFER, called as a witness in behalf of the defendants, being first duly sworn, was examined in chief by Mr. Howell and testified as follows:

Q. State your name?
 A. Charles Blickensderfer.
 Q. Practicing physician in Shawnee, Doctor?
 A. Yes, sir.

Q. Are you a graduate of a medical college?

A. Yes, sir.

Q. Which one?

A. University of Tennessee?

Q. How long have you been practicing, Doctor?

Q. Nearly 21 years.

Q. How long have you been practicing in Shawnee?

A. About ten—No, four years in Shawnee.

Q. Four years in Shawnee, how many years in this county.

A. Fourteen.

Q. Doctor, are you the physician and surgeon for the Rock Island Railway located at Shawnee?

A. Yes, sir.

159 Q. Did you ever make an examination of Mr. Ward?

Yes, sir.

Q. When did you first see him, Doctor?

A. The night of December the 10th, 1913.

Q. About what time?

A. Ten o'clock at night, a little later than that.

Q. What did you find then, Doctor?

A. Sprained ankle and a bruise of the hip.

Q. What, if anything, did you do?

A. I gave him treatment and took him to his home.

Q. What kind of treatment did you give him?

A. Put on a compress, a bandage, and gave him some local applications for the hip.

Q. Where did you put the brace or bandage?

A. On the foot—ankle.

Q. Was the skin broken upon the foot?

A. No, sir.

Q. What was the nature of this bruise—I mean this brace or bandage, that you put upon his foot?

A. Sterile gauze, a gauze bandage.

Q. Which foot was that.

A. Right foot, I think.

Q. The right foot?

A. Yes, sir.

Q. Did you afterwards treat him? Doctor?

A. Yes, sir.

Q. When did you see him next?

A. Next morning.

Q. Did you treat his foot then?

A. I did not remove the bandage, that dressing then, no.

Q. When did you see him next?

A. I saw him frequently after that, and I have not kept a tabulated statement of all the times.

Q. Doctor, have you any memory by which you can state it was the left or right foot.

A. Yes, I have not got it with me though. My files would state that.

160 Q. Your files?

A. Yes, sir.

Q. Did you afterwards make an ex-ray picture?

A. Yes, sir.

Q. Calling your attention to an ex-ray picture, I will ask you whether or not it was the right foot or left foot which you examined?

A. It was the left foot.

Q. Was that the one on which you put the brace?

A. Yes, sir.

Q. Now, when did you see Mr. Ward next, Doctor, after that time?

A. Well I saw him frequently after that, yes, sir; then I have got a record that I saw him on the 26th day of December.

Q. 26th of December?

A. Yes, sir.

Q. 1913?

A. Yes, sir.

Q. You say he had something the matter with his hip?

A. Yes, sir.

Q. What was that please?

A. Bruise.

Q. Bruise?

A. Yes, sir.

Q. Was the skin broken?

A. No, sir.

Q. What was the size of the bruise?

A. Well, I could not determine that.

Q. How large was it?

A. I could not determine that.

Q. Did you examine—

A. It was not a very large bruise; the limits of a bruise are not often well defined.

Q. Was the bruise on there on the 26th?

A. I think not.

Q. It has disappeared?

A. Yes, sir.

Q. Now, on the 26th day of December, 1913, you say you made another examination?

A. Yes, sir.

Q. Of the foot, what foot?

A. Why, the left one of course.

Q. What did you do at that time.

A. Well I had him put on a Gibney splint.

Q. State to the jury what a Gibney splint is.

161 A. Strips of adhesive plaster that hold the foot up this way hold the outside and keep it from turning over this way. The strips of plaster came around the foot this way, and attached to the leg here, strips of adhesive plaster. And then another that came around the foot this way, and pulled it that way, to hold the foot this way (illustrating the method).

Q. The one you put on this foot is the one you have just described?

A. The Gibney splint, yes, sir.

Q. When did you see Mr. Ward next?

A. Well, I saw him January 9th.

Q. Make an examination at that time?

A. Yes, sir.

Q. Make that examination with anybody?

A. Made that with Dr. Carson.

Q. On January 9th? That was 1914?

A. Yes, sir.

Q. Did you make an ex-ray picture of Mr. Ward's foot?

A. Yes, sir.

Q. I hand you this ex-ray picture marked Exhibit B, and ask you whether or not that is made from the plate of the ex-ray of Mr. Ward's foot? feet?

A. Yes, sir.

Q. Does that show both feet?

A. Yes, sir.

Q. Does that show any fracture of any of the bones in Mr. Ward's left foot?

A. No, sir.

Mr. Cutlip: Objected to as incompetent, irrelevant and immaterial, the picture itself will show.

The Court: Sustained.

The Court: —

Mr. Howell: Exception. If the court please he will probably have to explain the picture, because these ex-ray pictures are not seen every day.

162 The Court: That is true, but it is not every person who can explain them when he looks at them. He is not qualified.

Q. Doctor, have you an ex-ray machine?

A. Yes, sir.

Q. Have you taken ex-ray pictures?

A. Yes, sir.

Q. Do you know how to do it?

A. Yes, sir.

Q. Did you take an ex-ray picture of Mr. Ward's foot?

A. Yes, sir.

Q. Is this Exhibit B a picture made from the ex-ray plate of Mr. Ward's foot?

A. Yes, sir.

Q. Taken on January 9, 1914?

A. Yes, sir.

Q. Do you know who took this picture?

A. Yes, sir.

Q. You took this picture, Exhibit B, did you?

A. I did.

Q. Does that show a true, and is it a true representation of his feet as taken by the ex-ray?

A. Yes, sir.

Q. Does that picture, Doctor, show any fracture of any of the bones of Mr. Ward's left foot?

A. It does not.

Q. Doctor, on January 9, 1914, when you made this examination, what was the condition of Mr. Ward's feet.

A. Well, they were flat, both of them.

Q. Both of them?

A. Yes, sir.

Q. What else was their condition.

A. He claimed tenderness in them, in the left foot.

Mr. Cutlip: We move to strike that out as not responsive as to what he found.

A. I did not find anything except flatfoot in both feet.

Q. Didn't find anything?

A. A little thickening, perhaps on top of the left foot.

Q. What is that thickening, describe it to the jury.

A. It was a thickening of the soft parts, the meat and skin and soft tissues between the meat and skin.

163 Q. Describe to the jury, Doctor, the effect of the ligaments and tendons and the parts of the arch of the foot which result in flat foot?

A. Explain what? I didn't get that.

Q. The effect of the—of flat foot, or the causes of flat foot in so far as the ligaments and tendons and the bones of the foot are involved and concerned?

A. That is two questions: cause and effect?

Q. Sir?

A. Cause and effect?

Q. Cause and effect.

A. Well, the causes are a good many. It usually begins in early childhood, and again may be produced by long sickness, and again from a man being over weight, or in holding or carrying excessively heavy weight for a long time.

Q. Doctor, what I want to get at is what the effects on the ligaments and tendons before flat foot develops are; are they lengthened, stretched, or anything of that kind?

A. Oh, yes.

Q. Just describe that condition to the jury.

A. The ligaments that connect the bones together in the arch of the foot become weak and relax, like a piece of old stretched rubber, and it allows the foot to settle down and the foot nearly always turns the sole outwards, it does always more or less, some, in some cases greater than in others, the foot rotates outward, you might say inward, but the sole of the foot turns out, has a tendency to turn out and the physical effect of that is, is that what you want?

Q. Yes?

A. Pain in moving around in the foot, calves of the legs, and thighs, and sometimes in the hips.

Q. Doctor, did you give Mr. Ward any support for the bottom of his left foot?

A. Yes, sir.

Q. Is that the usual support?

A. Yes, sir.

Q. The support which you gave him?

A. Yes, sir.

164 Q. For the lifting up of the arch?

A. Yes, sir.

Q. What was your purpose in giving that support?

A. Lift up the arch and also to rest the foot.

Q. What is the nature of that support that you gave him.

A. It is a steel arch, and some of them have double steel arches, but I don't remember whether this had a double or single, I think it was single, and covered with leather to fit the sole of the foot, and it keeps the arch up and the front part rests under the ball of the foot and the back part under the heel.

Q. Doctor, is there any permanent condition, abnormal condition in Mr. Ward's feet outside of the flat foot, permanent abnormal condition?

A. No, sir.

Q. In the left foot?

A. No, sir.

Q. Doctor, referring back to this thickening, was that thickening movable or loose?

A. I don't think it was.

Q. Does it affect any part of the foot in the use of the foot?

A. No, sir.

Mr. Howell: Take the witness.

Cross-examination by Mr. Cutlip:

Q. You say you are in the employ of the company as local physician here?

A. Yes, sir.

Q. And you have been for a number of years?

A. Four years.

Q. And you were on the 10th day of December, 1913?

A. Yes, sir.

Q. And you were also in the employ of the company at the time that this picture that you have here.

A. Yes, sir.

Q. Was taken. And you say that was taken and developed by yourself?

A. Depeloped in my office, yes, sir.

Q. Did you develop it?

A. I did not, the girl developed it.

Q. The girl developed it?

A. Yes, sir.

Q. Were you present when it was developed?

A. No, sir.

Q. Do you know anything about the art of developing a ray of that kind?

165 A. Yes, sir.

Q. Can you do it?

A. I can do it, I am not skilfull at it.

Q. Well, are you prepared to state that the ex-ray, when photographed as there will disclose anything except the bones of the foot?

A. Why, it will disclose the outline of the shape of the foot.

Q. But will not show the ligaments and the muscles and anything except the outlines and the bones.

A. Flesh, the outlines of the foot the outside of the foot.

Q. And the bones?

A. And the bones.

Q. And that is all it does show?

A. Yes, sir.

Q. Now, doctor, you say that the flatfoot is occasioned by very many causes?

A. From a good many, yes, sir.

Q. What one of the—would one of the causes be if a party was thrown from any height and struck suddenly on something solid, would tend to mash down the foot and relax the ligaments.

A. It would take a hard fall, it would if he would fall hard enough and light on the bottom of his feet.

Q. If he was a man that would weigh from 160 to 180 pounds, and fell eighteen feet, the tendency would be to do that?

A. Yes, sir.

Q. Well, the tendency is more to do it than not to do it.

A. It would depend on the individual.

Q. What do you mean by that.

A. If he was in extra good health the tendency is he would not do it, but if he was to fall hard and had been sick and in a weakened condition from disease and then have a fall it could do it.

Q. And it is reasonable to believe it could do it and that would be the result?

A. Under those circumstances.

Q. Under those circumstances. Now, Doctor, you say you made an examination on the night of the 10th and also the next 166 morning. Was that examination an extended one or just an ordinary examination?

A. It was a careful examination.

Q. And what did you do on the night of the 10th towards wrapping up his foot or binding it up?

A. I put a compress on there to take the swelling out first.

Q. — the jury what you mean by that.

A. — a bandage of sterile gauze and cotton tightly over the swelling, and wet it with a solution of alcohol and boric acid, and left it before I put on any other dressing.

Q. How long did you leave that on.

A. I don't remember just how long I did leave it on.

Q. State precisely, Doctor, what condition you found that foot in at that time?

A. It was badly sprained.

Q. It was badly sprained?

A. Yes, sir.

Q. Could you tell whether it was recently done?

A. Yes, sir, done recently.

Q. And had been for some time——

A. Recently done.

Q. Recently done. Then what condition did you find it in on the next morning, on the morning of the 11th?

A. It was very painful, of course.

Q. Swollen, was it?

A. Yes, sir.

Q. Did you take off these bandages?

A. No, sir, I did not take them off.

Q. How long did they remain on there?

A. I don't remember.

Q. How long did they remain on there.

A. Probably four or five days, because we did not want to take them off.

Q. Yes, sir.

A. After you put them on under those circumstances.

167 Q. Then you made no examination after the examination the first evening, and how long a time did it take you to do that, when you made the examination when he first came in.

A. I went to see him and examined him up there.

Q. Where?

A. At the yards.

Q. And then you took him home — your residence?

A. No, to his home.

Q. To his?

A. My office, made an examination and took him home.

Q. All on the night of the 10th?

A. Yes. A. Yes, and someone helped me I don't remember the man's name, that helped me up to his rooms.

Q. Four or five days after that you removed this wrapping?

A. I don't know what date.

Q. Well, about that.

A. Sometime about that.

Q. Do you remember outside of the swollen condition, and sprain, what condition you found it in?

A. It was still swollen.

Q. Doctor, you also discovered at the same time that his hip was hurt?

A. Yes, sir.

Q. Stand up and show the jury?

A. Right over the point of the hip bone, of the thigh.

Q. That had the appearance of being recently done?

A. Yes, sir.

Q. And how large—what abrasures, if any, were made there?

A. None.

Q. None? How could you tell that anything had struck it.

A. Well, it seemed somewhat swollen there.

Q. Swollen?

A. But you cannot tell how much, there is not much tissue over that bone

Q. Right on this bone?

A. (Indicating.) A little lower down on the point that sticks out.

168 Q. Here? (Indicating.)

A. Yes, sir.

Q. That bone works in a kind of a socket?

A. Yes.

Q. It was right over that?

A. Yes, sir.

Q. From the examination you made there, Doctor, what was the probable effect of that wound or whatever you would call it as to permanency.

A. Well, it would not be permanent.

Q. Could you tell?

A. Well that would be my judgment.

Q. You could not tell from any examination you made.

A. I can tell that it would not be.

Q. How can you tell?

A. Just my judgment.

Q. Oh, just your judgment?

A. That has been my experience in injuries of that kind.

Q. That has been your experience in injuries of that kind?

A. Yes.

Q. How large, how much was there of it, how much. This bruise?

A. As large as the opening of an ordinary sized teacup?

Q. Was as large as that?

A. Yes, sir.

Q. Right on that bone?

A. Yes, sir.

Q. Did you ever make an ex-ray examination of that afterwards?

A. No, sir.

Q. Now, Doctor, you say that you later on, I think, say, about the 15th or 16th of February, you made an examination with Dr. Carson and Dr. Rice?

A. Yes, sir.

Q. Both or one?

A. Dr. Rice.

Q. Dr. Rice?

A. Yes, sir.

Q. Where was that examination made?

A. In my office.

Q. At that time do you remember in what condition he was with reference to being able to walk or not.

A. He claims he was not.

169 Q. Well, what did you find?

A. Well, I could not find a thing wrong with his foot except the flatfoot in both feet, except—

Q. Except, well—

A. That he had a little thickening on the left.

Q. That was on these muscles here?

A. Yes, sir.

Q. Because he had flatfoot here, would it cause that to puff up here?

A. It might.

Q. Did it?

A. I don't know.

Q. As a matter of fact you don't know what did it, do you?

A. I don't know what did that, he might have done it by lacing his shoe too tight.

Q. You had charge of this case from the time it happened on the 10th to February?

A. Yes, sir.

Q. Now, tell the jury what it was then that time that caused that rising there?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Aren't you able to say it was because of that sprain of the foot?

A. No, sir.

Q. Will you say it was not that?

A. No, it was not.

Q. You still adhere to the fact you don't know.

A. It might have been one or the other, or it might have been, for instance, lacing his shoe too tight.

Q. Then that time he did not have any shoe on?

A. No.

Q. Well, then that could not cause it.

A. It might have caused it before.

Q. Before?

A. Yes.

Q. And then it would disclose itself or manifest itself after he got hurt, is that it?

A. No.

Q. Was there anything there to indicate the time when it was done?

A. No, sir, you see when—

Q. No, just wait a minute. I will ask the question.

A. All right.

170 Q. Now, Doctor, you say you bound his foot up in this shape for the purpose of drawing it over in this direction?

A. Yes, sir.

Q. Or back? Which way was it.

A. To draw it up in this direction. (Indicating.)

Q. To draw it up in that direction?

A. Yes, sir.

Q. Would the flat foot cause that to turn in that direction?

A. No, the flat foot generally causes it to turn in that direction (indicating).

Q. Then it was reversed from that the flatfoot would cause it?

A. How is that.

Q. You aimed to put it back where the flat foot would usually put it because you found it reversed from that condition.

A. No, sir.

Q. What did you find?

A. I put it back, because the sprain was over here; the foot had turned that way because of the sprain, but the flat foot turned the way.

Q. The flatfoot did not cause it to turn in that condition.

A. I don't know. His foot turned in this direction.

Q. You put a plaster on that, what did you call it?

A. A splint

Q. You gave him a splint for the left foot?

A. Yes, sir.

Q. Because it was a flat foot, was that it.

A. Because this arch had settled down instead of being up this way.

Q. Because he was flatfooted?

A. Yes, sir.

Q. What caused the flatfoot you are not prepared to say?

A. No.

Q. Why didn't you give him one for the left.

A. I got him one for the left.

Q. For the right, I mean.

A. Because I was not treating the right foot, and it was naturally that way.

That is all.

Redirect examination by Mr. Howell:

Q. Doctor, you say when you examined him first his left foot was swollen?

A. Yes, sir.

Q. Was it possible to determine or did you determine there was any swelling of the soft tissue?

A. Oh, yes. Left foot?

Q. Yes?

A. Yes.

Q. I don't believe you understood my question. Did you ascertain at that time that the foot was in a swollen condition, when you first examined it, that there was any soft tissue which was swollen?

A. You mean thickened?

Q. I mean thickened.

A. I could not tell, you see the whole top of the foot was swollen then from the injury, and after the swelling went down there was left the thickening in the soft tissue and I could not tell when that originated.

Q. You don't know whether it was at the time you examined him whether it was there at the time you examined the foot the first time or not?

A. No, sir.

Q. Doctor, you say there was a sprain in the left foot when he first came to you?

A. Yes, sir.

Q. How many times have you examined it since that time?

A. I don't know.

Q. Examined him with Dr. Rice and with Dr. Carson?

A. Yes, sir.

Q. And several times by yourself?

A. Yes, sir.

Q. Did you find any evidences of any sprain or effects of any sprain, any evidence in that left foot—now?

Mr. Cutlip: We object; he has not fixed the time that he made the examination.

172 Mr. Roberts: He said now.

The Court: Ask him how recently?

Mr. Howell: How recently?

A. I examined him the last time on the 16th of February, 1914.

Q. When you made that examination at that time were there any evidences of the sprain?

A. No, sir.

Q. For which you treated him?

A. No, sir.

Q. Had they all disappeared?

A. Yes, sir.

Mr. Howell: I believe that is all.

Recross-examination by Mr. Cutlip:

Q. You don't know anything about what condition his foot is in now since February 16, 1914, do you?

A. No, sir.

Q. Now, Doctor, didn't you examine this plaintiff in conjunction with Dr. Rice on the 9th day of April, 1914, as well as the 16th day of February, and don't your records in fact say that?

A. I don't know, I don't remember, I would have to go and look.

Q. You don't remember. Well, now is it not a fact that you did not examine the plaintiff with Dr. Rice on the 16th of February at all, but with Dr. Carson?

A. No, sir, I examined him on the 9th of January with Dr. Carson, and on the 15th of February with Dr. Rice, and I think I did examine him another time with Dr. Rice, but I don't remember the date.

Q. You don't remember the date?

A. No.

173 FRED WARD, recalled as a witness in behalf of the defendants, was examined in chief by Mr. Howell, and testified as follows:

Q. State to the jury where you got your flat foot from.

A. I have had flat foot from infancy.

Mr. Cutlip: I am asking what he is back for.

Mr. Howell: I am calling him as my witness.

Mr. Cutlip: Pardon me. Then we object to that question because it is leading and suggestive.

The Court: What is the question, state to the jury where you got—

Q. You have had flat foot since infancy?

A. Ever since I can remember, yes, sir.

Mr. Howell: Defendant rests.

174 SAM S. GILL, called as a witness in behalf of the plaintiff was examined in rebuttal by Mr. Pendleton, and testified as follows:

Mr. Pendleton: We want to call Judge Reason, he was duly subpoenaed and was here, and will be back on the five o'clock train.

The Court: Maybe the defense will admit what he would swear to?

Mr. Roberts: I think it is in reference to impeachment?

Mr. Pendleton: Yes, sir.

Mr. Roberts: Of course we would not be willing to admit that.

The Court: Is there any other witness?

Mr. Pendleton: None except Earl Ward.

The Court: I was going to say if you only have Judge Reason wait for we will take a recess to 5:40, so I could be preparing the instructions, but Ward ought to be here.

Mr. Pendleton: We did not have him subpoenaed.

Mr. Roberts: If the court desires to consider the case closed with the exception of Judge Reason, if the court desires it for convenience we have no objection.

The Court: I will make it 5:30, thirty minutes' recess.

Mr. Howell: I would like to offer this in evidence, Exhibit B.

The Court: No objection?

Mr. Howell: I had it marked, I neglected to formally offer it.

Mr. Cutlip: We object — incompetent, irrelevant and immaterial and the record shows they have rested.

The Court: I will permit it to be introduced.

Mr. Cutlip: Exception.

175 Mr. Roberts: We consider the case now closed with the exception of Judge Reason's testimony.

The Court: Yes, sir.

Mr. Roberts: Comes now the defendant C., R. I. & P. Railway Company, at the conclusion of the evidence in this case and move the court to instruct the jury to return a verdict in its behalf for the reason that the evidence, together with all reasonable inferences to be drawn therefrom, is insufficient to sustain a verdict in behalf of the plaintiff and against this defendant under the Federal employers' liability act of 1908, which determines the rights of the parties hereto.

The Court: Overruled.

Mr. Roberts: Exception.

Mr. Roberts: Now the same motion as to A. J. Carney.

The Court: Overruled.

Mr. Roberts: Exception.

E. D. REASOR, called as a witness in rebuttal on behalf of the plaintiff, was examined by Mr. Pendleton, and testified as follows:

Q. E. D. Reason?

A. Yes, sir.

Q. You live in Shawnee, Judge?

A. Yes, sir.

Q. Acquainted with Mr. Ward there, the plaintiff?

A. Yes, sir.

Q. Do you know Mr. Earl Ward, his brother?

A. Yes, sir.

Q. Do you know Mr. Carney, here, Mr. A. J. Carney?

A. I have no personal acquaintance with Mr. Carney.

176 Q. But you know him when you see him?

A. Well, I have seen him a great many times.

Q. I say you know him when you see him?

A. Yes, I know his face, but I didn't know his name.

Q. Well, I will ask you, judge, if you remember having a conversation with Mr. Carney in your office last summer, some time last summer?

Mr. Roberts: Wait a minute.

Mr. Pendleton: Wait a minute, I am not through—in the presence of Mr. Earl Ward.

Mr. Roberts: We object.

The Court: Is that all?

Mr. Pendleton: Preliminary.

The Court: Overruled. Answer that by yes or no.

Q. Did you have a conversation with him in your office?

A. A great many. Yes, a great many.

Q. Well, did you have one conversation with him with Earl Ward?

A. A great many with Earl Ward.

Q. Were the two of them together?

A. He brought some man in there with him, and to the best of my knowledge now that is the man.

Q. This is the man?

A. Yes, sir, that came in with Earl Ward.

Q. He came in with Earl Ward?

A. But as I said before, I didn't know the man's name. I know his face; his face is familiar, but if he told me his name at the time it has passed out of my mind.

Q. Well, this is the man?

A. Well, that is the best of my recollection.

Q. Well, did you have any conversation with him about his situation with relation to the railway company on account of the Ward case and—the Fred Ward case?

177 Mr. Howell: We object to the question for the reason that the identity of the person is not shown to be known by this witness.

The Court: Objection will be sustained on that ground.

Mr. Pendleton: We will ask to have Earl Ward brought in first. Keep your seat. Tell Earl Ward to come in.

(Earl Ward is called by the bailiff.)

Mr. Pendleton: He says to the best of his knowledge this is the man.

The Court: That is not sufficient in impeachment in my opinion.

EARL WARD, called as a witness in behalf of the plaintiff in ~~n~~ buttal, was examined by Mr. Pendleton, and testified as follows:

Q. I just want to ask you one or two questions. Mr. Ward, do you know Mr. Carney?

A. Yes, sir.

Q. Do you know Judge Reasor?

A. Yes, sir.

Q. Did you, at some time last summer, right before the trial of the case of Ward against the railroad company, last fall, go to Judge Reasor's office with Mr. Carney?

A. Yes, sir.

Q. And have a conversation there with Judge Reasor?

A. Yes, sir.

Q. What was that conversation?

Mr. Howell: Just a moment. We object to it as the time of the conversation is not stated; no proper foundation laid for the impeaching question, incompetent, irrelevant and immaterial.

The Court: This question is what it was about.

Mr. Howell: Not proper rebuttal.

The Court: The rule is you will have to ask him the identical question.

178 Mr. Pendleton: I want to identify the transaction.

The Court: You seem to be using both these witness, you must use one or the other at a time.

Mr. Pendleton: Judge Reasor, stand aside.

Mr. Pendleton: Take the witness chair, Mr. Ward.

The Court: Now propound your question. Have you a copy of the impeachment question, can you ask it?

Mr. Pendleton: I don't remember exactly. I had better have him (meaning the reporter) read it if he can, the question to Carney.

And thereupon the reporter read the question put to the Witness Carney, as follows, to-wit: "Mr. Carney, didn't you state on a certain date during the summer of 1914, I am not able to give the precise date, to Judge Reasor, in the presence of Mr. Earl Ward, in Judge Reasor's office, in substance this: that you had lost your job on account of this Ward business, and that you could not get it back unless you would swear to a lie for the company, in substance?"

Mr. Pendleton: I am not sure that statement, that question is

right, but I want to know whether he made any such statement as that.

The Court: Ask the question.

Q. Now, Mr. Ward, I believe you stated you had heard this conversation, in that conversation between Mr. Carney and Ed—Judge Reasor, did you hear the language used or in substance used that was read to you just now?

Mr. Howell: Just a moment. We object to the question as not proper in form for an impeaching question; no time or place stated in the question, the impeaching question to Carney or to this witness. If the court please, they would have to fix the time in the question to Mr. Carney.

The Court: The original question was somewhat indefinite 179 as to time, the place was fixed exactly, and the individuals present.

Mr. Howell: Before you—

The Court: If you will wait you won't get this record all mixed up. The question, while indefinite, the objection will be overruled.

Mr. Howell: Exception.

The Court: Answer the question.

A. Put the question to me direct you want me to answer direct.

Q. Did you hear Mr. Carney say in substance in that conversation that he lost his job on account of this Fred Ward case and he could not get it back unless he would swear a lie or words to that effect?

Mr. Howell: Objected to as not proper in form for an impeaching question, no time and place stated, and no proper foundation laid for the impeaching question, incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Howell: Exception.

The Court: Answer the question yes or no.

A. Well, it was in very near them words; not exactly as he read it off, it was pretty near in those words.

Q. Yes, sir; what variation if there was any?

Mr. Howell: Just a moment, we object as not proper rebuttal.

The Court: Objection sustained.

Mr. Pendleton: That is all.

Cross-examination by Mr. Howell:

Q. You were discharged, were you?

A. Yes, sir.

Q. And you were up to see Mr. Reasor as your attorney?

A. No, sir.

Q. Now, what was the purpose of your going to Mr. Reasor's office?

180 A. Garnishment case.

Q. He was your attorney then?

8—Rec.

A. In the garnishment case he was, not in the "dischargement" to settle the matter so I could go back to work.

Q. He was your attorney in the garnishment matter?

A. Yes, sir, it had done been cleared up prior to this.

Q. The garnishment matter was what you went up for?

A. Before this it was straightened out.

Q. What then did you go up to see Mr. Reasor and Carney for?

A. Mr. Carney asked me to walk up there, we walked up and had a conversation.

Q. You had a conversation?

A. Yes, sir, in behalf of him.

Q. And that is the only conversation, and that is the only conversation?

A. No, we had a conversation down on the street.

Q. Now, what month was this?

A. Well, I believe it was in May as well as I remember.

Q. In May, what year?

A. 1914.

Q. I thought you said last summer?

A. In May or June, I would not swear positively the date.

Q. Was it in July?

A. No, sir, it was not in July.

Q. Either May or June?

A. Yes, sir.

Q. Where was Judge Reasor's office?

A. Up-stairs over the public drug store, whether it is now.

Q. Over the Public Drug Store, where it is now?

A. Yes, sir, unless he has moved since I was up there.

Q. Carney asked you to go up and see Judge Reasor?

A. To walk up there.

Q. To walk up there, do you know whether he had ever been there?

A. I don't know, he did not say.

181 Q. That was the first time you ever went up with Mr. Carney?

A. Yes, sir.

Q. And the last time?

A. Yes, sir.

That is all.

Mr. Pendleton: State whether or not that was the only conversation with reference to the Fred Ward case you had with Mr. Carney in Reasor's office.

A. Yes, sir; that was the only conversation.

E. D. REASOR, recalled as a witness in behalf of the plaintiff in rebuttal, was examined by Mr. Pendleton, and testified as follows:

Q. Judge Reasor, I will ask you if along about last spring or summer, say in May or June, and if you can fix the date more definitely I would be glad, you heard a conversation with Mr. Carney

here and Mr. —— in the presence of Mr. Earl Ward, in your office, with reference to the Fred Ward case?

A. Yes, sir, I could fix the date.

Q. Could you fix the date.

A. I could fix the date by records in my office, by a case I had at Haileyville for Fred Ward. Fred Ward.

Q. For Earl.

A. Earl Ward.

Q. Earl Ward, yes, a garnishment matter?

A. Yes, sir.

Q. You could fix the date.

A. Yes, Earl was at my office frequently in connection with that suit he had down there in which I was defending for him.

Q. Yes, sir. But independent of referring to my records I could not fix the date any more than it was last year.

Q. Yes, sir.

A. And it was as early as in the summer, and possibly in the early spring.

Q. Either spring or summer, you could not fix the date definitely.

182 A. I am just fixing that by remembering it was quite a while ago, about that, but I know it was during 1914.

Q. You had this garnishment proceeding on hand?

A. I had that and that is the reason I know about when it was.

Q. I will ask you, Judge, if in that conversation you heard Mr. Carney say in substance that he had lost his job on account of this Ward case against the Rock Island, and could not get reinstated unless he would swear a lie, or words to that effect.

Mr. Howell: Object, no time or place stated, no foundation for this impeaching question laid or asked Mr. Carney while upon the stand; not proper rebuttal, incompetent, irrelevant and immaterial. This witness cannot fix the time.

The Court: Let the court ask a question, Judge Reasor, do you recognize Mr. Carney as the man who was present and entered into the conversation at the time you referred to; is he the man.

A. I believe he is.

The Court: Do you know.

A. To know positively I could not know. He was a stranger to me, and I talked to him just that one conversation. To the best of my knowledge he is the man, best of my knowledge.

Mr. Pendleton: Mr. Carney admits he was there.

The Court: Objection overruled.

A. Answer the question Judge, yes or no.

A. No.

Q. Not in that language?

A. He didn't say it, no; you asked me if Mr. Carney said that to me. No; he did not say it to me.

Q. Did he say anything to you about it.

Mr. Howell: Wait a minute. We object.

Mr. Pendleton: I would like a moment to talk to Judge Reason just a moment.

183 (And thereupon counsel for plaintiff conferred with the witness Reason.)

Mr. Pendleton: I will ask to put Mr. Carney on the stand again.

Mr. Roberts: We object.

The Court: Do you object to recalling Mr. Carney?

Mr. Roberts: Yes, sir.

The Court: Objection sustained.

Mr. Pendleton: We have got the evidence to show what Carney said.

The Court: Put him on the stand.

Mr. Roberts: The case was closed by agreement with the exception of Judge Reason's testimony.

Mr. Pendleton: We have got him here, we have got to put him (Carney) on the stand to put it in the proper form, I don't think it is right to cut us out of this evidence entirely.

The Court: He was not here. He was subpoenaed. Through fault of the Court he was not here. Well, I will permit it, come around, Mr. Carney.

Mr. Howell: Give us an exception.

The Court: After this you have your witness present to put the proper impeaching question.

Mr. Pendleton: I always do.

Mr. Roberts: I will suggest that Judge Reason suggested to us a moment ago that the fees were demanded and not paid was the reason he was not here.

The Court: I don't want to hear about that. Proceed.

A. J. CARNEY, recalled by permission of court for the purpose of laying foundation for impeachment, examined by Mr. Pendleton, testified as follows:

Q. Mr. Carney, do you remember the circumstance of being in Judge Reason's office with Earl Ward last spring or summer, and having a conversation with Judge Reason.

184 Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, not fixing the time and place of the conversation sufficiently definitely for the purpose of an impeaching question.

The Court: Objection overruled. Go on and get through.

A. I remember being up there with Earl Ward at the time he was out of the service for being garnished.

Q. Yes.

A. By his solicitation.

Q. By Ward's solicitation?

A. Yes, sir, asked me if I would go up and hear what Mr. Reason had in regard to him and his settlement with the Rock Island, and I said, Certainly, I have got nothing else to do, I went upstairs and there was no conversation whatever in regard to Fred Ward's case.

Q. Now, then, wait, I want to ask you this question. If you did not in that conversation state in substance to Judge Reasor that: You could not get—you were out of a job and you could not get—out of a job on account of this Ward case—put that in—and you could not get—get reinstated with the Rock Island,—you could not get reinstated unless—you would—unless you would straighten up this matter with the company, and that the superintendent told you in a conversation that you could not be reinstated until you straightened up the Ward case, or words to that effect?

A. No, sir.

Q. And that you asked the superintendent if he expected you to perjure yourself, and he said, Well, it's up to you. You didn't state that or words to that effect?

A. No, sir.

Q. I will ask you if Mr. Earl Ward, then in your presence at that time did not state that this is the man—in substance—that this is the man that was on duty when Fred Ward was hurt, and that he is out of a job and can't get back again unless he will straighten this up with the company, and the superintendent told him so, and that he—you, Carney, asked the superintendent if he expected you to perjure yourself, and the superintendent says to you, that's up to you. If Mr. Ward didn't say—Earl Ward—say—say in your presence and to Mr. Reasor, words in substance that, and you were silent.

A. I think I have answered that.

Q. Answer that?

A. No.

Redirect examination by Mr. Howell:

Q. Was Mr. Reasor your attorney?

A. No, sir.

Q. Ever been your attorney?

A. No, sir.

Q. Was anything ever said about the Fred Ward case, and being out of a job?

A. No, sir.

Q. Who did the talking?

A. Earl Ward and Mr. Reasor.

Q. Did you have anything to say?

A. Not a thing in the world.

Q. Were you suspended Mr. Carney?

A. Sir.

Q. Sir? Were you suspended?

A. Were I suspended?

Q. Yes?

A. Yes, sir.

Q. What was the reason?

A. For failure to report for duty.

Q. Were you suspended for anything that had to do with this Ward case?

A. Nothing whatever.

Mr. Pendleton: Don't you know as a matter of fact it is the habit of these railroad defendants when they want to can a man, they can him for something else, and you don't know what it is for.

Mr. Roberts: Object.

The Court: Objection sustained, and the question will be stricken from the record and the jury instructed not to consider it 186 and counsel instructed not to repeat it.

Mr. Pendleton: He has not answered it anyhow.

Witness excused.

E. D. REASOR recalled in rebuttal for the plaintiff examined by Mr. Pendleton, testified as follows:

Q. Judge Reasor, I will ask you if you remember having a conversation with Mr. Earl Ward and the defendant, Mr. Carney in your office some time in the spring or summer of last year at a time when you were engaged by Mr. Earl Ward in a garnishment of his proceeding of his?

A. Just about that time.

Q. Yes, sir. I will ask you if Mr. Carney stated to you in substance as follows; that he was out of a job, and that he had had conversation with the superintendent and the superintendent told him he could not come back unless he would straighten up this Ward case, and he asked the superintendent if he expected him to perjure himself, and the superintendent says, it's up to you, or words in substance to that effect.

A. Yes, sir, substantially.

Mr. Howell: Objected to, no proper foundation laid.

The Court: Objection overruled.

Mr. Howell: Exception.

Mr. Howell: No time and place stated and the witness has not testified except to his best recollection Carney was the man.

The Court: Overruled.

Mr. Howell: Exception.

Cross-examination by Mr. Howell:

Q. You were not attorney for Mr. Carney?

A. Never in my life.

Q. You were attorney for Mr. Ward, Earl Ward?

187 A. Well, I don't know whether, Mr. Howell, I don't know that I was on that particular day.

Q. You had been?

A. During the spring I was in another matter.

Q. And the matter that you were talking about with Mr. Ward was when Mr. Ward came up with the garnishment matter.

A. No, sir, that is not what he came up for.

Q. Up to see you.

A. He had no conversation with me only the one Judge Pendleton asked me about.

Q. Ward brought him up?

A. On that particular occasion.

Q. Is that all they said?

A. Oh, no. In substance that is what he asked me, if that is substantially what they said, and that is in substance.

Q. Not all they said?

A. No, sir.

Q. That is not in substance all they said?

A. No, sir.

Q. Did you take any action with reference to this conversation?

A. I told them what I would do.

Q. You told them what you would do?

A. Yes, sir.

Q. Have you done anything?

A. I done what I told them I would do.

Q. You did what you told told them you would do?

A. Yes, sir.

Q. What was that?

A. Do you want to know what they did say, I will tell you.

Q. Just a moment, I will ask you directly did you have a conversation with Mr. Carney after that, did you ever see him after that?

A. I have seen him a number of times.

Q. Did he ever come to your office after that.

A. I don't recall that he did.

Q. Did you have any connection with him after that time?

A. Not that I now remember, no sir.

188 Q. Did you ever communicate with him by telephone or letter?

A. Did I call him up?

Q. Yes?

A. No, sir.

Q. Never talked with him since that time to the best of your recollection.

A. About that matter?

Q. Yes?

A. I am positive I never did discuss this matter on that occasion, but on that occasion.

Q. You are positive you never did.

A. Yes, sir, and you would be positive too, if I told you what I told him.

That is all.

Mr. Pendleton: Plaintiff rests.

Mr. Roberts: We have one witness. We consented to rest when it was agreed the one witness was all that would be used further in the case, we are not certain we will use him, but if he comes he will not be but two or three minutes on the stand.

A. J. CARNEY recalled in surrebuttal was examined by Mr. Howell and testified as follows:

Q. Mr. Carney, did you ever have a conversation with Mr. Reddig in which he told you you would have, in order to be reinstated, as an employee of the Rock Island, that you would have to straighten up the Ward case, referring to the case of Fred Ward against the company and yourself?

A. No, sir.

Mr. Cutlip: We object to that as incompetent, irrelevant and immaterial.

189 The Court: Overruled. Let's get through with this. Go ahead and answer.

A. No, sir.

Q. Did you tell him or in substance did you tell him, Mr. Reddig, at any time that, ask him if he, Mr. Reddig, wanted you to commit perjury?

A. No, sir.

That is all.

Mr. Pendleton: That is all.

H. F. REDDIG, called as a witness in surrebuttal in behalf of the defendants, was examined by Mr. Howell, and testified as follows:

Mr. Cutlip: I would like to know what this is about?

The Court: This is surrebuttal as to Judge Reasor's testimony.

Q. State your name?

A. H. F. Reddig.

Q. What position, if any, have you with the Rock Island, Mr. Reddig?

A. Superintendent.

Q. Where are you located, where do you have your office?

A. Haileyville.

Q. Do you know Fred Ward?

A. Yes, sir.

Q. Do you know A. J. Carney?

A. Yes, sir.

Q. Mr. Reddig, did you ever suspend A. J. Carney from the employment of the Rock Island?

A. Yes, sir.

Q. What was the cause of that suspension?

A. Well, he and a yard clerk we had here did not report one night for duty, and did not show up for a couple of days.

Q. Did that suspension have anything to do with the Ward case or accident?

A. No, sir.

190 Q. Did Mr. Ward ever——

Q. Did Mr. Carney ever make an application to you for reinstatement and you tell him that he would have to straighten up the Fred Ward case against the company and himself before he could be

reinstated, and that Mr. Carney answered you in substance, asking you whether you wanted him to perjure himself?

Mr. Pendleton: Object to that as incompetent, irrelevant and immaterial.

The Court: Sustained. Nobody testified Mr. Reddig said that; that was somebody saying that the superintendent said it.

Mr. Howell: Exception.

Q. Did you have any conversation with Mr. Carney giving to him as the reason for his being discharged that he must straighten up the Ward case.

A. No, sir; I never talked with Mr. Carney about the Ward case, not one word.

Take the witness.

Cross-examination by Mr. Pendleton:

Q. When was that that Mr. Ward was suspended by you for failure to report for duty?

A. When was Mr. Ward?

Q. Yes, sir. No. Mr. Carney, beg your pardon?

A. I cannot give you the exact date, some time last spring.

Q. Some time this last spring, 1914?

A. Yes, sir, some time early in the spring; I do not know the exact date.

Q. Did he work for the company continuously, did Carney work for the company continuously after the Ward accident until he was discharged late in the spring of 1914?

A. Yes, sir; that is, so far as he wanted to; if he laid off or anything I didn't know anything about that.

Q. He was in the employment of the company?

A. Yes, sir.

191 Q. Isn't it a fact about the 20th of December, 1913, Mr. Carney was laid off?

A. No, sir.

Q. It was not? He was still in the employment of the company on that date?

A. Yes, sir.

Q. Well, what do you mean by failing to report for duty.

A. Well, he was regularly assigned and was supposed to show up in the evening for his position to take it.

Q. At Haileyville?

A. No. At Shawnee, and he and the yard clerk this particular night did not show up, and the yardmaster took the matter up and made a report of it, and we—

Q. Suspended him?

A. Yes, sir.

Q. Well he left here along in this month didn't he in February, left the employment of the company?

A. Yes, sir.

Mr. Roberts: We object.

The Court: Sustained.

Mr. Pendleton: I will state what I want to prove.

The Court: You went into that pretty fully with Mr. Carney.

Mr. Pendleton: Now it is—I hate to say it before the jury. Come up here.

Mr. Pendleton: Here plaintiff seems to prove by the witness Redding that the defendant Carney left the services of the Company early in the month of February, 1915 without any leave of absence, and was not suspended and has not yet been suspended from service on that account.

The Court: Do you object to that?

Mr. Roberts: Certainly. Objected to as incompetent, irrelevant and immaterial. Not within the issues in this case.

The Court: Objection sustained.

Mr. Pendleton: That is all.

192 & 193 The Court: Case closed?

Mr. Pendleton: Plaintiff closes.

Mr. Roberts: Defendants rest.

Testimony closed.

194 STATE OF OKLAHOMA,
County of Pottawatomie, ss:

In the Superior Court.

No. —.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RY. CO., Defendant.

Certificate of Stenographer.

I, W. L. Ducker, do hereby certify that I am the official reporter of the above named court, and was such at the trial of the above named cause at the January, 1915, term of said court.

That the above and foregoing transcript of testimony contains all the testimony of all the witnesses called and testifying on said trial, all the exhibits introduced or offered in evidence, all offers to prove, all objections made by counsel, the rulings of the court thereon, and the exceptions taken, and all such other matters and proceedings and matters as were requested by counsel or directed by the court to be reported in said trial, and the above and foregoing is a true, full, complete and correct transcript of all of the proceedings had and done upon the trial of said cause as faithfully reported by me in shorthand and by me reduced to writing.

Witness my hand at Shawnee, Oklahoma this 23rd day of May, 1915.

W. L. DUCKER,
*Official Reporter of the Superior Court in
and for Pottawatomie County, Oklahoma.*

195 The above and foregoing is all the evidence offered and all the evidence introduced in the trial of the above entitled cause.

Be it remembered, then, that thereafter and before the court instructed the jury in writing, the defendants offered to the Court, in writing, its requested instructions, which instructions were *were* refused and exceptions allowed, and which said instructions, as subsequently filed in the office of the Clerk of said Court on the 25th day of February, 1915, are in words and figures as follows, to-wit:

196 *Requested by Defendant.*

Inst. No. 1. You are instructed that the evidence in this case shows that plaintiff's accident occurred while switching car C. R. I. & P. Ry. Co. No. 56,643 from train # 92 coming into Shawnee to another train # 92 going out of Shawnee and that said car was shipped from Wichita, Kansas, to Alexandria, Louisiana.

You are therefore instructed that the rights of the parties in this case are determined by the Federal Employers' Liability Act of 1908 as defined in these instructions.

Refused and exception allowed.

LEANDER G. PITMAN,
Judge.

Requested by Defendant.

Inst. No. 2. You are instructed that the plaintiff as a part of his contract of the employment agree to assume all the natural and ordinary risks of the employment and all the probable results thereof. You are instructed therefore if you find that the accident complained of in the petition of the plaintiff herein, resulted from such risks and hazards incident to the service in which he was employed you will find no damages for the plaintiff and your verdict should be for the defendant.

Refused and exception allowed.

LEANDER G. PITMAN,
Judge.

Endorsed: 2114. Fred Ward vs. C. R. I. & P. Ry. Co., Instructions requested by defendant and refused. Filed Feb. 25, 1915. In Superior Court, Pottawatomie County, Okla. R. L. Flynn, Court Clerk, by E. Willett, Deputy.

197 Be it further remembered that thereafter and before the jury retired to deliberate on their verdict, the plaintiff requested the court to give to the jury the following instructions, which instructions, as subsequently filed in the office of the Clerk of said Court, on the 25th day of February, 1915, are in words and figures, including the notations thereon by the Court, as follows, to-wit:

198 No. 1. You are instructed that the duty which the defendant Carney owed to the plaintiff, under the circumstances disclosed by the evidence in this case, was the duty to use

ordinary care which care is such as would be used by an ordinarily prudent person under the like or similar circumstances.

Requested by Plaintiff.

By W. S. PENDLETON &
T. G. CUTLIP,

Att'y's for Plf.

Given.

PITMAN.

No. 2. You are instructed that if you find from the evidence that it was the duty of the defendant Carney to cut or uncouple the cars, and then signal the engineer to stop and if this was omitted or neglected by the defendant Carney, and that you further find from the evidence, that such neglect or omission was the proximate cause of the plaintiff's injury, if you find the plaintiff was injured, then it is your duty to find for the plaintiff in such an amount as will compensate the plaintiff for the injury sustained, if any; unless you find from a fair preponderance of the evidence that the accident by which the plaintiff received his injury was caused by the plaintiff's own contributory negligence, as you are hereafter instructed, or that the risk was one of the necessary and natural risks incident to plaintiff's employment, as you are hereafter instructed, then in that event you shall find for the defendants.

Requested by Plaintiff.

By W. S. PENDLETON &
T. G. CUTLIP,

Att'y- for Pf.

Given.

PITMAN.

No. 3. You are instructed that if you find by a fair preponderance of the evidence that the defendant, Carney, was negligent, and that the plaintiff received some injury, or injuries, which were proximately caused by the negligence of the defendant, 199 Carney, it will then be your duty to consider whether the plaintiff was guilty of contributory negligence, and if you find he was not guilty of contributory negligence then you should consider whether the risk by which the plaintiff received his injury, was one of the natural and ordinary incidents and risks of the service of switchman; then you are instructed that the burden is upon the defendant to establish by a fair preponderance of the evidence that the plaintiff received his injury as a result of his own contributory negligence, or that the accident, was one of the natural and ordinary incidents of the employment of a switchman in which capacity the plaintiff was at the time engaged.

Requested by Plaintiff.

By W. S. PENDLETON &
T. G. CUTLIP,

Att'y's for Pf.

Refused.

Given in Substance.

PITMAN.

No. 4. You are instructed, gentlemen of the jury, that contributory negligence as used in these instructions, is that act or omission on the part of the plaintiff, which is in effect, a want of ordinary care which concurring with the negligent act of the defendant, Carney, was the proximate cause of the injury sustained by the plaintiff, if injury you find.

Requested by Plaintiff.

By W. S. PENDLETON &
T. G. CUTLIP,

Att'ys for Pf.

Refused.

Given in Substance.

PITMAN.

No. 5. You are instructed that negligence means such an act or omission by the defendant, Carney, to use that degree of care and skill which it was his duty to use for the protection of the plaintiff from injuries under the circumstances of this case, as disclosed by the testimony. And you are instructed that that care which it was the duty of defendant Carney to use was ordinary care, 200 which is that degree of care and caution which might be reasonably expected from an ordinarily prudent person under the same circumstances.

Requested by Plaintiff.

By W. S. PENDLETON &
T. G. CUTLIP,

Att'ys for Pf.

Refused.

Given in Substance.

PITMAN.

No. 6. You are instructed that even though you find that the defendant Carney was negligent as you have been instructed, yet if you find that the plaintiff was guilty of contributory negligence, or if you find that the risk in which he was injured, if you find that he was injured, was one of the risks incident to his employment you are instructed that your verdict must be for the defendant Carney and for the defendant Chicago, Rock Island and Pacific Railway Company.

Requested by Plaintiff.

By W. S. PENDLETON &
T. G. CUTLIP,

Att'ys for Pf.

Given as Modified.

PITMAN.

No. 7. You are instructed, gentlemen of the jury, that the proximate cause, as used in these instructions, is that cause which connects the negligent act with the injury sustained, if any, and that

such negligent act was the cause of the injury and without such negligent act the injury would not have occurred.

Requested by Plaintiff.

By W. S. PENDLETON &

T. G. CUTLIP,

Att'y's for Pf.

Refused.

Given in Substance.

PITMAN.

No. 8. You are instructed that if you find for the plaintiff under the evidence and these instructions, your verdict should be for the plaintiff for such a sum as you may find will reasonably compensate the plaintiff for the injury he has sustained, if any; and in determining the amount which you will allow the plaintiff it will be your duty to consider the pain and suffering which you find he underwent as the immediate result of such injury, and which you may find from the evidence he will still continue to suffer and his impaired earning power resulting from the injury sustained, if any, and you should also take into consideration the permanent injury, if any, which the plaintiff has sustained, and find for the plaintiff in a sum not exceeding the amount of \$10,000.00.

201 Requested by Plaintiff.

By W. S. PENDLETON &

T. G. CUTLIP,

Att'y's for Pf.

Given in Substance.

PITMAN.

Endorsed: 2114. Filed Feb. 25, 1915. In Superior Court, Potawatomi County, Okla. R. L. Flynn, Court Clerk. By R. L. F., Deputy.

202 And thereafter and prior to the deliberation of the jury upon the said cause, the Court instructed the jury in writing of his own motion, which said instructions as given by the Court to the jury, together with exceptions allowed to the parties, are in words and figures as filed with the Clerk on the 26th day of February, 1915, as follows, to-wit:

203 STATE OF OKLAHOMA,
Pottawatomie County, ss:

In the District Court.

No. 2114.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. and A. J. CARNEY,
Defendants.

Instructions.

No. 1.

In this case the plaintiff sues the defendants for damages for injuries which the plaintiff alleges that he received on or about the 10th day of December, 1913, while in the employment of the defendant railway company as a switchman in the switch-yards of the defendant railroad company in the city of Shawnee under the charge of the defendant, A. J. Carney, as engine foreman, in the employment of the defendant company. Plaintiff alleges that while he was in the discharge of his duties as switchman and standing on top of the car at the west end of a string of cars being shoved along one of the tracks in the yard of defendant railway company in the city of Shawnee, the defendant, Carney, and the defendant railway company, by and through the negligence of the defendant, Carney, caused the engineer to turn the throttle and apply the air brakes to said engine, thereby causing the speed of said engine to be retarded, with the result that the cars of said string began to check up in speed violently one at a time and finally checking impulse reached the car on which the plaintiff was standing just as plaintiff was stooping over to turn the brake at the west end of said car, when said car was checked in motion so violently and suddenly that plaintiff was thrown over in front of said car to the ground between the tracks of the road bed a distance of about twelve feet.

204 Plaintiff alleges that it was the duty of the defendant railway company and of the defendant, Carney, by proper directions to cause the said cars to be uncoupled from the engine so that they might run down to the proper place under the control of the plaintiff; that it was the duty of the plaintiff, as soon as the said cars were uncoupled from said engine to so manipulate said brakes of said car as to regulate the speed thereof and keep them under control so that they might be stopped at the proper place. Plaintiff avers that by reason of said fall he struck the drawbar of said car with his hip whereby his hip was bruised and sprained, giving him great and excruciating pain, from which plaintiff still suffers greatly. And

that by reason of said fall plaintiff's left foot striking with great force against and on the frog of a switch of said track was crushed and bruised by said fall, and being wedged tightly in said frog was violently wrenched from said frog by a blow of the drawbar of the moving car, so that the bones thereof were broken and misplaced, causing the plaintiff great pain and suffering and that the plaintiff believes and alleges partially disabling plaintiff for life. Plaintiff sue for the sum of \$10,000.00.

Answering this petition the defendant Carney and the defendant railroad company have filed general denials, and upon the issues thus joined the burden of proof is upon the plaintiff to show by a preponderance of the evidence that he was entitled to recover at the time of the filing of this suit.

You are further instructed that the defendant company further answering, pleads contributory negligence and assumption of risk; that is to say, the defendant company says that the injuries 205 which the plaintiff alleges to have been received by him, which are not admitted but expressly denied, were not due to or proximately caused by any negligence on the part of the defendant or any of its servants, agents, officers or employees, but that said alleged injuries, if any such there were, were directly due to and proximately caused by his own negligence and want of ordinary care. And further, that the injuries of plaintiff, if any, were due to the ordinary and usual risks and hazards of plaintiff's employment and which plaintiff well knew when he accepted such employment. And you are instructed that contributory negligence and assumption of risk, being what is known in law as affirmative defenses, the burden of proving the same is upon the defendant railroad company, and for the defendant to avoid liability on either of these defenses, it must prove the same by a preponderance of the evidence.

2.

You are instructed that the plaintiff's right to recover in this case must be based upon the following propositions. First, a relation of master and servant existing between the plaintiff and the defendant company at the time of the injury, and, as a matter of law, thereunder, a duty owing by the defendant and its agents and servants and employees, and by the defendant A. J. Carney, as such, to use ordinary care and caution in the circumstances of the case to protect the plaintiff from injury; Second, a failure to perform such duty such as amounted to a want of ordinary care and prudence, in other words, which amounted to negligence; and, third, injury resulting to the plaintiff as the proximate result of such negligence.

Excepted to by Def't.

LEANDER G. PITMAN,
Judge.

You are instructed that it is admitted in this case that the relation of master and servant existed between the plaintiff and the de-

fendant company in this case, and that therefore, as a matter of law the company, and the defendant, A. J. Carney as the servant of the defendant, owed the plaintiff the duty to use ordinary and reasonable care and prudence to protect the plaintiff from injury. You are therefore instructed that if you find, from a preponderance of the evidence in this case that the manner in which you find from the evidence the cars of the defendant company were switched or handled by the defendant company, and the defendant, A. J. Carney, amounted to negligence, under the circumstances of this particular case, and that as the proximate result of such negligence the plaintiff was injured, then you should return your verdict in favor of the plaintiff and against the defendants.

Excepted to by defendants.

LEANDER G. PITMAN,
Judge.

No. 4.

You are instructed, however, that the defendant, under its plea of assumption of risk, has introduced evidence for the purpose of showing that the handling and switching of the cars in question at the time of the injury complained of were the usual and ordinary way in which railroad companies and their servants in the exercise of ordinary care and prudence ordinarily and usually handle such cars, and that the plaintiff, by reason of his experience, intelligence and observation knew such fact and knew the dangers and hazards attendant thereon. And you are instructed that if you find from a preponderance of the evidence in this case, under the definition of assumption of risk as heretofore given you and under the law as given to you in these instructions, that the injury complained of was the result of one of the usual and ordinary risks of plaintiff's employment, and that the plaintiff assumed the same when he accepted his said employment, then and in that event the plaintiff cannot recover and your verdict should be for the defendants.

No. 5.

You are further instructed that the defendant, under its plea of contributory negligence, has introduced evidence for the purpose of showing that from the circumstances and facts following the giving of the "east signal" testified to by the witnesses in this case, there followed certain noises and occurrences by which the plaintiff, in the exercise of ordinary care for his own safety, could or should have known that the slack was being taken up in the cars in question, and further that in the use of ordinary care for his own safety in the light of all the attendant facts and circumstances, the plaintiff was guilty of contributory negligence in placing himself where he did at the time of the injury, and that such negligence contributed to his injuries, if any. And you are instructed in this connection that

if you believe from a preponderance of the evidence that the plaintiff's own negligence proximately contributed to his injury, then the law is that even though you should find the defendant guilty of negligence in the manner of handling said cars, the plaintiff cannot recover, and your verdict should be for the defendants.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

208

No. 6.

You are instructed that if you find from the evidence, by a preponderance thereof, that it was the duty of the defendant Carney to cut or uncouple the cars, and then signal the engineer to stop, and if this was omitted or neglected by the defendant Carney, and that you further find from a preponderance of the evidence that such neglect or omission was the proximate cause of the plaintiff's injury, if you find the plaintiff was injured, then it is your duty to find for the plaintiff in such an amount as will compensate the plaintiff for the injury sustained, if any; unless you find from a fair preponderance of the evidence that the accident by which the plaintiff received his injury was caused by the plaintiff's own contributory negligence, and as you are hereinafter instructed, or that the risk was one of the necessary and natural risks incident to plaintiff's employment, as you are hereinafter instructed, in which event you should find for the defendants.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

No. 7.

You are instructed that even though you find that the defendant, Carney, was negligent, under the law as given to you in these instructions, yet if you find that the plaintiff was guilty of contributory negligence, or if you find that the risk in which he was injured, if you find that he was injured, was one of the risks incident to his employment, and that the plaintiff assumed same under his employment, you are instructed that your verdict must be for the defendant Carney and for the defendant Chicago, Rock Island & Pacific Railway Company.

Excepted to by Defendant.

LEANDER G. PITMAN,
Judge.

209

No. 8.

You are instructed that the duty which the defendant Carney owed to the plaintiff, under the circumstances disclosed by the evidence in this case, was the duty of ordinary care which care is

such as would be used by an ordinarily prudent person under the like or similar circumstances.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

No. 9

You are instructed that negligence is the proximate cause of an injury when it is a cause from which a man of ordinary experience and sagacity, in the light of all the attendant circumstances, could foresee that the result might probably ensue.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

No. 10.

"Negligence" as used in these instructions, means a want of ordinary care. By ordinary care is meant such care as men of ordinary prudence usually exercise under similar circumstances.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

No. 11.

You are further instructed that while a servant does not assume the extraordinary and unusual risks of the employment yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the master's negligence nor such as

210 are latent, or are only discoverable at the time of the injury.

The doctrine of an assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knew, or in the exercise of reasonable and ordinary care, should know the risk to which he is exposed, he will, as a rule, be held to have assumed them; but where he either does not know, or knowing, does not appreciate such risk, and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovering for injuries.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

No. 12.

You are instructed that contributory negligence is negligence of the plaintiff, or of a person on account of whose injury the action

is brought, amounting to a want of ordinary care, and proximately contributing to bring about the injury. In order to constitute such negligence as will bar a recovery of damages, two elements must concur: First, a want of ordinary care on the part of the plaintiff; second, a proximate connection between this want of ordinary care and the injury complained of, and these are always questions of fact to be determined by the jury. The question is, has the care, diligence or skill demanded by the peculiar circumstances of the particular case been exercised? If so, there is no negligence. If not, there is negligence. The plaintiff was not negligent if he exercised reasonable care. He was negligent if he failed to do so. His conduct is to be estimated by what a reasonably prudent man would have done under the circumstances.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

211

No. 13.

You are instructed that what is meant by the term "ordinary care or diligence" as used in these instructions is such care or diligence as persons of ordinary prudence usually exercise about their own affairs of ordinary importance.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

No. 14.

You are instructed that under the law the plaintiff assumed the ordinary risks of the service of switchman, so far as those risks at the time of his entering upon the employment were known to him, or were readily discernible by a person of his age and capacity in the exercise of ordinary care, whether the service of switchman was dangerous or not. And you are instructed that the ordinary risks of the business, or the service of a switchman are those risks which are part of the natural and ordinary methods of conducting the business in switching cars in railroad yards.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

No. 15.

You are instructed that by a preponderance of the evidence as used in these instructions is meant not necessarily the greater number of witnesses, but by a preponderance of the evidence is meant that quantum of character of evidence, which in the light of all the evidence, facts and circumstances in proof in the case, is most satisfying and convincing to the minds of the jurors.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

212

No. 16.

If you find from the evidence in this case that the plaintiff is entitled to recover from the defendant, then it is your duty to award such sum by way of damages as you believe from the evidence will fairly compensate the plaintiff for the loss he has sustained by reason of his injuries; and in arriving at such amount you may consider the age of the plaintiff at the time of the accident, his health and physical condition, his habits, his earning capacity, the character of his injuries as to whether they are permanent or otherwise, the physical pain and mental suffering, if any, which he has suffered or will suffer by reason of his injuries, loss of time, if any, together with all the other facts and circumstances in the case showing or tending to show the amount of damage the plaintiff has sustained, but your verdict should not on any event exceed the amount claimed in the plaintiff's petition.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

No. 17.

You are the sole judges of the facts in this case and of the weight of the evidence and the credibility of the witnesses and in deciding what weight and credit you will give to the testimony of any witness, you may consider the interest or lack of interest which such witness may have in the outcome of the suit, the manner of the witness in testifying, the reasonableness or unreasonableness of the testimony given by him, his intelligence or lack of intelligence, his opportunity for knowing the matters concerning which he testifies, and from all the surrounding circumstances in the case, determine which witness is entitled to the greater weight and credit and give credit accordingly.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

213

No. 18.

You are instructed that in passing upon the question of the admissibility of any evidence, the court has not expressed nor intimated, nor intended to express or intimate any opinion as to the weight or credibility of the evidence. The court has simply determined what evidence offered in the case was proper to go before you for your consideration. As to the weight and credit to be given to the evidence that has been introduced, you are the sole and only judges. And in this connection you are instructed that it is of the utmost importance that you carefully weigh all the evidence in this case, so that you may, if it is possible to do so, ascertain the exact truth. The court is powerless to correct any mistake that you might make in your determination of a material fact—the evidence is conflicting, and therefore if you should make a mistake in such regard justice may go astray and the court therefore desires to impress upon your minds the importance of a full, careful, unbiased, unprejudiced and intelligent

consideration of all the evidence, facts and circumstances in the case.
Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

No. 19.

You are instructed that you must consider these instructions all together. You have no right to consider any part or parts of the same to the exclusion of other portions thereof.

Excepted to by defendant.

LEANDER G. PITMAN,
Judge.

No. 20.

You are instructed that in this case any nine or more of your number may agree upon and return a verdict. In the event your verdict is reached by a concurrence of less than your whole number then it will be necessary for each juror concurring in the verdict to sign the same. If your verdict is unanimous it need only be signed by your foreman.

Excepted to by def't.

LEANDER G. PITMAN,
Judge.

Given February 25, 1915.

LEANDER G. PITMAN,
Judge.

Endorsed: Filed Feb. 26, 1915. In Superior Court. Pottawatomie county, Okla. R. L. Flynn, Court Clerk.

214 Be it remembered, that thereafter, the jury having been instructed as before set forth by the Court, retired for deliberation, and later returned into open Court, a verdict, which said verdict, as filed in the office of the Clerk of Said Court on the 26th day of February, 1915, was in words and figures as follows, to-wit:

215

Verdict—Civil Cause.

STATE OF OKLAHOMA,
Pottawatomie County, ss:

In the Superior Court of the County of Pottawatomie, State of Oklahoma.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY Co. and A. J. CARNEY, Defendant.

Verdict.

We, the Jury empaneled and sworn in the above entitled case, do, upon our oath, find for the plaintiff and assess the amount of his recovery at \$3,000.00.

(9) V. V. JONES,
Foreman.

(1) W. A. DENISON.	(5) W. A. MOORE.
(2) N. E. CALLAHAN.	(6) J. E. HORN.
(3) W. A. DEISTER.	(7) J. R. ALEXANDER.
(4) N. P. BELL.	(8) E. E. BRYANT.

Endorsed: No. 2114. Verdict. Civil Cause, Superior Court, Pottawatomie County. Filed Feb. 26, 1915. In Superior Court, Pottawatomie County, Okla. R. L. Flynn, Court Clerk. By R. L. F., Deputy. Rec. 4-12-15.

216 Be it further remembered that subsequently and within three days thereafter, and on the 1st day of March, 1915, there was filed in the office of the Clerk of the above named court, the separate Motion for a New Trial by the defendant, The Chicago, Rock Island and Pacific Railway Company, which motion for new trial is in words and figures as follows, to-wit:

217 **STATE OF OKLAHOMA,**
Pottawatomie County, ss:

In the Superior Court in and for Said County and State.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendants,
and A. J. CARNEY.

Motion for New Trial.

Comes now the defendant, Chicago, Rock Island & Pacific Railway Company, and moves the Court to vacate and set aside the verdict and judgment herein rendered on the 26th day of February, 1915, and to grant a new trial to this defendant for the following causes which affect materially the substantial rights of the said defendant to-wit:

- (1.) Because of irregularity in the proceedings of the Court by which this defendant was prevented from having a fair trial.
- (2.) Because of irregularities in the proceedings of the jury by which this defendant was prevented from having a fair trial.
- (3.) Because of irregularities in the proceedings of the plaintiff, by which this defendant was prevented from having a fair trial.
- (4.) Because of the misconduct of the jury.
- (5.) Because of the misconduct of the plaintiff.
- (6.) Accident and surprise which ordinary prudence could not have guarded against.
- (7.) Excessive damages, appearing to have been given under the influence of passion or prejudice.
- (8.) Errors in the assessment of the amount of recovery, in that the same is too large and is excessive.
- (9.) Newly discovered evidence, material for this plaintiff, which it could not, with reasonable diligence, have discovered and produced at the trial.
- (10.) Errors of law occurring at the trial, and excepted to by the parties defendant.
- (11.) Because this defendant was denied a fair trial under the Constitution of Oklahoma, Article 2, Sec. 7, and Art. 2, Sec. —.
- (12.) Because the defendant was denied a fair trial by 218 being deprived of the Federal right given under the Constitution of the United States and amendments thereto, in denying to it due process of law and the equal protection of the law.
- (13.) That the Court erred in refusing to give to the jury instructions requested by the defendant Nos. 1, 2, & 3 and erred in refusing to give to the jury each of said requested instructions, to which refusal the defendant excepted at the time.
- (14.) That the Court erred in giving to the jury instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and

erred in giving to the jury each of said instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 & 20 to which instructions defendant excepted at the time.

(15.) That the Court erred in refusing to give to the jury the peremptory instruction to return a verdict for the defendant, to which action of the court the defendant excepted at the time.

(16.) Because W. A. Denison, one of the jurors returning the verdict in the cause in favor of the plaintiff and against the defendant, was not a fair, unbiased or impartial juror; that said juror upon his voir dire examination by the defendant stated that he had never had any claim or suit against, or any trouble with, any railroad company, and that he could and would return a fair and impartial verdict under the law and the evidence, and that he had knowledge of nothing which would prevent him from returning a fair and impartial verdict in said cause; that defendant *had* said time believed said juror's statement, and had no knowledge of any kind to the contrary; but since said trial and the return of said verdict has learned that said juror was not a fair and impartial juror and should not have been permitted to sit as a juror in said cause; that defendant and its attorneys since said verdict have learned that the said juror did have a claim against the Chicago, Rock Island & Pacific Railway Company, in which he demanded five hundred dollars and which was settled for \$100.00; that said claim was for personal injuries; that said juror had worked for the said defendant Company in its shops at Shawnee, and had been discharged and had attempted to get employment in said shops within the last three months, and had stated in substance that he was barred from employment in said shops, and had threatened the general foreman in said shop with personal violence; that said juror had had difficulty with nearly every foreman in said shops, and that said juror on account of such facts was hostile to the defendant railway company, and not a fair, unbiased and impartial juror; that defendant and its attorneys did not know such facts and the said juror concealed the same; that said juror was for the highest amount which could be given to the plaintiff, and influenced the members of said jury by statements to them, as defendant is informed and believes; that if this defendant had known such facts it would have challenged such juror and would not have permitted him to sit as a juror in the case, but that said juror in sitting in said cause prejudiced the rights of this defendant, and prevented this defendant and its evidence from having a fair and impartial trial of said cause; that defendant will support the allegations made herein with oral evidence and with affidavits upon the hearing of this motion for new trial. Some of the affidavits are attached hereto.

Wherefore, for all of above things and matters, affecting its substantial rights, the defendants prays for a new trial of this cause, etc.

C. O. BLAKE,
R. J. ROBERTS,
EDWARD HOWELL,
Attorneys for Defendant,
Chicago, Rock Island & —.

STATE OF OKLAHOMA,
Pottawatomie County, ss:

Edward Howell, being first duly sworn, upon oath states that he is one of the attorneys for the defendant Chicago Rock Island & Pacific Railway Company, the defendant above named; that he has read the above and foregoing motion for new trial, and the contents thereof are true as he verily believes.

EDWARD HOWELL.

Subscribed and sworn to before me this March 1, 1915.

[SEAL.]

VERNA WHITESELL.

Notary Public.

Com. Exp. 3-29-18.

STATE OF OKLAHOMA,
Pottawatomie County, ss:

E. W. Townsend, of lawful age, being first duly sworn, upon oath states: That he is General Car Foreman of the shops of the Chicago Rock Island & Pacific Railway Company, at Shawnee; that he is well acquainted with W. A. or J. D. Denison, who was one of the jurors in the case of Fred Ward v. said Company and A. J. Carney, tried in the Superior Court of Pottawatomie County, Oklahoma; that he did not learn that said Denison was a juror in said cause until after

the verdict was returned in said cause, when he was advised 220 as to the same; that he has known the said Denison for several years, during a part of which time said Denison has been employed in the paint shops, in the back shops and in the blacksmith shops and the boilermaker shops of the said defendant Company; that the said Denison had some kind of trouble with the foreman of each of said shops, and apparently was — a boisterous troublesome disposition; that said Denison was not permitted to work in said shops; that he has made application to this affiant for work in said shops at a number of times; that he has not obtained work; that he approached this affiant wanting to know why he was kept out of work and was informed by affiant that he could not have work in his department; that affiant is informed and believes that said Denison has stated a number of times that he should have and would beat this affiant up; that this affiant had barred him for work in any of the shops; that affiant believes that said Denison is now and has been for a considerable length of time very unfriendly towards the defendant railway company; and that he could not be a fair and impartial juror in any case in which said Company was concerned, and further affiant saith not.

E. W. TOWNSEND.

Subscribed and sworn to before me this March 1, 1915.

[SEAL.]

VERNA WHITESELL.

Notary Public.

Com. Exp. 3-29-18.

Ex. "A".

STATE OF OKLAHOMA,
Pottawatomie County, ss:

J. E. Johnston, being first duly sworn, upon oath states: That he is Foreman of the Paint Shops of the Chicago Rock Island & Pacific Railway Company, at Shawnee, Oklahoma; that he is acquainted with W. A. or J. D. Denison, who worked for the said defendant Company in its shops at Shawnee under this affiant; that said Denison left the said paint shops after attempting to curse and cursing this affiant because this affiant had remonstrated with him about some painting of cars which the said Denison had done; that afterwards the said Denison, so affiant was informed and believes, worked in the back shop and the blacksmith shops of said defendant company at Shawnee, and had applied for a job under this affiant; that the last attempt of the said Denison to obtain employment under this affiant was about two or three months ago; that affiant is informed and believes that the said Denison has constantly attempted to shift from one employment in said shop to another and that he has had trouble with every foreman under whom he has worked and is of a loud mouthed and boisterous disposition; that affiant about a month ago, or in December 1914 or January 1915, heard said Denison state that he was going to or should beat E. W. Townsend, the general car Foreman at said Shops, because the said Townsend had barred him (Denison) from working in said shops at all; that affiant believes from the conduct and actions of the said Denison that he has been for a long time and is now very unfriendly to the Chicago Rock Island & Pacific Railway Company, and that in any case in which the said Company was a defendant, the said Denison would be a very unfair and biased juror; that affiant did not know that the said Denison was a juror in the case of Fred Ward v. said Company and A. J. Carney until after the verdict in said cause was returned, when he was informed of the same; and further affiant saith not.

J. E. JOHNSTON.

222 Subscribed and sworn to before me this March 1, 1915.
[SEAL.] VERNA WHITESELL,

Notary Public.

Com. Exp. 3-29-18.

Ex. B.

STATE OF OKLAHOMA,
Pottawatomie County, ss:

J. A. Dabbs, being first duly sworn upon oath states: That he is foreman of the Gang in the Backshop of the Chicago, Rock Island & Pacific Railway Company in Shawnee, Oklahoma; that he is acquainted with W. A. Denison who was one of the jurors in the trial of the case of Fred Ward v. Chicago, Rock Island & Pacific Railway Company in the Superior Court recently; that was Denison has worked in the backshop of defendant railway company in

Shawnee under this affiant; that said Denison quit said employment but has made application for employment several times within last year from this affiant; that said Denison was of a boisterous troublesome disposition, and affiant believes that in any case which the said Railway Company was interested, the said Denison would not and could not be a fair and impartial juror, as affiant believes he is sore at said Company and its foremen because he has not gotten employment at the said company's shops; and further affiant saith not.

J. R. DABBS

Subscribed and sworn to before me this March 1, 1915.

[SEAL.]

VERNA WHITESELL,
Notary Public

Com. Exp. 3-29-18.

Exh. C.

223 STATE OF OKLAHOMA,
Pottawatomie County, ss:

C. C. Butler, being first duly sworn, upon oath states: That he is Foreman of the Boilermaker shops of the Chicago, Rock Island and Pacific Railway Company, in Shawnee, Oklahoma; that he is acquainted with W. A. Denison, who worked in said Boilermaker shops in Shawnee under this affiant; that he is informed that said W. A. Denison was one of the jurors in the case recently tried in the Superior Court at Shawnee being the case of Fred Ward against said railway Company and A. J. Carney; that the said Denison attempted several times during the past year to get a position in the shops at Shawnee under this affiant; that this affiant did not desire to employ the said Denison and so informed him; that said Denison was and is of a quarrelsome and faultfinding disposition and continually fussing about the shops and the defendant railway company; that affiant believes that the said W. A. Denison was prejudiced against the defendant railway company and that said Denison could not and would not be a fair and impartial juror in any case for personal injuries against said defendant railway company; and further affiant saith not.

C. C. BUTLER

Subscribed and sworn to before me this March 1, 1915.

[SEAL.]

VERNA WHITESELL,
Notary Public

Com. Exp. 3-29-18.

Exh. D.

STATE OF OKLAHOMA,
Pottawatomie County, ss:

24 J. H. Brown, of lawful age, being first duly sworn, upon oath states: That he is Blacksmith foreman of the shops of the Chicago, Rock Island & Pacific Railway Company, in Shawnee, Oklahoma; that he is well acquainted with W. A. Denison, who was one of the jurors in the case of Fred Ward v. said Company and A. J. Carney, recently tried in the Superior Court of Pottawatomie County, Oklahoma; that the said W. A. Denison was working at said shops when there occurred an explosion of a boiler in said shops and the said Denison claimed he was injured in said explosion, and put in a claim for money damages against said company for \$100.00; that said claim was afterwards settled with the said Denison for the sum of \$100.00; that the said Denison was working for said Company in the Blacksmith shop of defendant company, and has worked in several of the other shops of said Company at Shawnee; that the said Denison is of a quarrelsome disposition, and has either resigned or been discharged in all instances; that he has made application to this affiant for reemployment but affiant would not reemploy him; that affiant believes that the said Denison is unfriendly to said Company and could not and would not be a fair and impartial juror in any case against said Company for personal injuries or otherwise and further affiant saith not.

J. H. BROWN.

Subscribed and sworn to before me this March 1, 1915.

[SEAL.]

VERNA WHITESELL,

March 1, 1915.

Com. Exp. 3-29-18.

Ex. E.

STATE OF OKLAHOMA,
Pottawatomie County, ss:

25 E. J. Smith, of lawful age, being first duly sworn, upon oath, states: That he has worked at the paint shop of the Chicago, Rock Island & Pacific Railway Company at Shawnee, Oklahoma, having charge of the paint shop stock room; that he is well acquainted with J. S. or W. A. Denison, who was a juror as affiant is informed in the case of Fred Ward vs. Chicago, Rock Island & Pacific Railway Company, et al., that the said Denison worked in the paint shop and this affiant has heard the said Denison curse the foreman and the employee of said shop and curse said shops and the said railway company; that the said Denison had worked in practically every department in said shops and under the various foremen, but was so unruly and boisterous that they had not retained him; that he had frequently been to the paint shop to get work and had been refused and that his cursing and state-

ments in regard to the foremen, employes, said shops and said railway company were made in connection with statements with reference to his not being able to go to work; that affiant believes the said W. A. Denison has been and is now sore at said company in its shops, and that he would not be a fair and impartial juror in any case in which the defendant company was a party defendant that affiant has heard the said Denison threaten to sue said company; and further affiant saith not.

ENOCH J. SMITH

Subscribed and sworn to before me this 1st day of March, 1915.

[SEAL.]

VERNA WHITESELL,
Notary Public.

My Com. Exp. March 29, 1918.

Exh. F.

Endorsed: No. 2114. In Superior Court. Fred Ward vs. Chicago Rock Island & Pacific Railway Co. et al. Motion for New Trial for Chicago, Rock Island & P. Ry. Co. Filed Mar. 1, 1915. In Superior Court Pottawatomie County, Okla. R. L. Flynn, Court Clerk. By R. L. F. Deputy. C. O. Blake, R. J. Roberts & Edward Howell, Attys.

226 Be it also remembered that subsequently and within three days thereafter, and on the same 1st day of March, 1915 there was filed in the office of the Clerk of the above named court the separate motion for a new trial by the defendant, A. J. Carney, which motion for new trial is in words and figures as follows, to-wit:

227 STATE OF OKLAHOMA,
Pottawatomie County, ss:

In the Superior Court in and for said County and State.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and
A. J. CARNEY, Defendants.

Motion for New Trial.

Comes now the defendant, A. J. Carney, and moves the Court to vacate and set aside the verdict and judgment herein rendered on the 26th day of February, 1915, and to grant a new trial to this defendant for the following causes which affect materially the substantial rights of the said defendant, to-wit:

(1.) Because of irregularity in the proceedings of the Court by which this defendant was prevented from having a fair trial.

(2.) Because of irregularities in the proceedings of the jury by which this defendant was prevented from having a fair trial.

(3.) Because of irregularities in the proceedings of the plaintiff, by which this defendant was prevented from having a fair trial.

(4.) Because of the misconduct of the jury.

(5.) Because of the misconduct of the plaintiff.

(6.) Accident and surprise which ordinary prudence could not have guarded against.

(7.) Excessive damages, appearing to have been given under the influence of passion or prejudice.

(8.) Errors in the assessment of the amount of recovery, in that the same is too large and is excessive.

(9.) Newly discovered evidence, material for this defendant, which he could not, with reasonable diligence, have discovered and produced at the trial.

(10.) Errors of law occurring at the trial, and excepted to by the parties defendant.

(11.) Because this defendant was denied a fair trial under the Constitution of Oklahoma, Article 2, Sec. 7 and Art. 2 Sec. —.

(12.) Because the defendant was denied a fair trial by being deprived of the Federal right given under the Constitution of the United States and amendments thereto, in denying to him 228 due process of law and the equal protection of the law.

(13.) That the Court erred in refusing to give to the jury instructions requested by the defendant Nos. 1, 2 & 3 and erred in refusing to give to the jury each of said requested instructions, to which refusal the defendant excepted at the time.

(14.) That the Court erred in giving to the jury instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and erred in giving to the jury each of said instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 to which instructions the defendant excepted at the time.

(15.) That the Court erred in refusing to give to the jury the peremptory instructions to return a verdict for the defendant, to which action of the court the defendant excepted at the time.

(16.) Because W. A. Denison, one of the jurors returning the verdict in the cause in favor of the plaintiff and against the defendant, was not a fair, unbiased or impartial juror; that said juror upon his voir dire examination by the defendant stated that he had never had any claim or suit against, or any trouble with, any railroad company, and that he could and would return a fair and impartial verdict under the law and the evidence, and that he had knowledge of nothing which would prevent him from returning a fair and impartial verdict in said cause; that defendant had — said time believed said juror's statement, and had no knowledge of any kind to the contrary; but since said trial and the return of said verdict has learned that said juror was not a fair and impartial juror and should not have been permitted to sit as a juror in said cause; that defendant and its attorneys since said verdict have learned that the said juror did have a claim against the Chicago, Rock Island & Pacific Railway Company, in which he demanded five hundred dol-

lars and which was settled for \$100.00; that said claim was for personal injuries; that said juror had worked for the said defendant Company in its shops at Shawnee, and had been discharged and had attempted to get employment in said shops within the last three months, and had stated in substance that he was barred from employment in said shops, and had threatened the general foreman in said shops with personal violence; that said juror had had difficulty with nearly every foreman in said shops, and that said juror on account of such facts was hostile to the defendant railway company, and not a fair, unbiased and impartial juror; that defendant and its attorneys did not know such facts and the said juror concealed the same; that said juror was for the highest amount which could be given to the plaintiff, and influenced the members of said jury by statements to them, as defendant is informed and believes; that if this defendant had known such facts it would have challenged such juror and would not have permitted him to sit as a juror in the case; but that said juror in sitting in said cause prejudiced the rights of this defendant, and prevented this defendant and his evidence from having a fair and impartial trial of said cause; that defendant will support the allegations made herein with oral evidence and with affidavits upon the hearing of this motion for new trial.

Wherefore, for all of above things and matters, affecting its substantial rights, the defendant prays for a new trial of this cause,
etc.

229

R. J. ROBERTS,
EDWARD HOWELL,
Attorneys for A. J. Carney.

STATE OF OKLAHOMA,
Pottawatomie County, ss:

Edward Howell, being first duly sworn, upon oath states that he is one of the attorneys for the defendant, A. J. Carney, the defendant above named; that he has read the above and foregoing motion for new trial, and the contents thereof are true as he verily believes.

EDWARD HOWELL.

Subscribed and sworn to before me this 1st day of March, 1915.

[SEAL.]

VERNA WHITESELL,
Notary Public.

Com. Exp. March 29, 1915.

Endorsed: No. 2114. In Superior Court. Fred Ward vs. Chicago, Rock Island & Pacific Railway Co. et ale. Motion for New Trial of A. J. Carney. Filed Mar. 1, 1915. In Superior Court, Pottawatomie County, Okla. R. L. Flynn, Court Clerk. By R. L. F. Deputy.

230 Be it further remembered that on the 26th day of March, 1915, there was filed with the Clerk of the said Superior Court of Pottawatomie County, State of Oklahoma, a Journal Entry

of the Court, which was a journal entry of judgment, and which journal entry of judgment was in words and figures as follows:

231 In the Superior Court of Pottawatomie County, State of Oklahoma.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and A. J. CARNEY, Defendants.

Journal Entry.

Now on this the 25th day of February, 1915, the same being a regular judicial day of said court, coming on to be heard the above entitled cause, and all parties appearing by attorneys, and the plaintiff Fred Ward and the defendant A. J. Carney, also appearing in person; and a jury of good and lawful men, to wit: V. V. Jones and eleven others, having been duly and legally empaneled and sworn in said cause; and all parties, plaintiff and defendants having offered their evidence, and having closed their causes respectively; and the jury having heard the evidence and having heard the argument of counsel on both sides, retired under the instructions of the court to consider of their verdict; and thereafter on to-wit, the 26th day of February 1915, the said jury returned into open court the following verdict, to wit:

STATE OF OKLAHOMA,
Pottawatomie County, ss:

In the Superior Court of the County of Pottawatomie, State of Oklahoma.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY & A. J. CARNEY, Defendants.

Verdict.

We, the jury empaneled and sworn in the above entitled case, do, upon our oath, find for the Plaintiff, and assess the amount of his recovery at \$3,000.00.

V. V. JONES, *Foreman.*

- 232 (1) W. A. DENISON.
- (2) N. E. CALLAHAN.
- (3) W. A. DEISTER.
- (4) N. P. BELL.
- (5) W. A. MOORE.
- (6) J. E. HORTON.
- (7) J. R. ALEXANDER.
- (8) E. E. BRYANT.

It is therefore ordered and adjudged by the court that said verdict of the jury be and the same is in all things approved, and that the plaintiff Fred Ward do have and recover of and from the defendants The Chicago, Rock Island and Pacific Railway Company and A. J. Carney, the sum of \$3,000.00, together with all costs in this behalf incurred; for all of which let execution issue.

LEANDER G. PITMAN,
Judge.

O. K.

T. G. CUTLIP.
W. S. PENDLETON.

O. K.

EDWARD HOWELL.

Endorsed: 2114—2-26-'15. Fred Ward p'tiff v. The Chicago, Rock Island & Pacific Ry. Co. Def't. Journal Entry. Filed March 26, 1915. In Superior Court Pottawatomie County, Okla. R. L. Flynn, Court Clerk. By E. Willett, Deputy. Rec. 4-12-'15.

233 Thereafter and on the 10th day of March, 1915, the motions for new trial in said cause coming on for hearing, the court heard evidence upon the questions therein involved and at the conclusion thereof granted time within which to prepare and file a bill of exceptions in said cause, which said bill of exceptions as filed on the 13th day of March, 1915, is in words and figures as follows to-wit:

234 STATE OF OKLAHOMA,
Pottawatomie County, ss:

In the Superior Court in and for Said County and State.

No. 2114.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and A. J. CARNEY, Defendants.

Bill of Exceptions.

Be it remembered, That on the 10th day of March, 1915 the same being one of the regular judicial days of the January, 1915, term of the Superior Court of Pottawatomie County, State of Oklahoma, the above entitled cause came on to be heard upon the separate motions of the defendants, Chicago, Rock Island & Pacific Railway Company and A. J. Carney, to vacate and set aside the verdict of the jury and the judgment of the Court in the above entitled cause, before me, the Honorable Leander G. Pitman, Judge of said Court, and in said cause and upon said hearing the following proceedings were had and the

following evidence introduced and the following orders made upon said motions for new trial, to-wit:

The plaintiff was present by his attorneys, W. S. Pendleton and T. G. Cutlip, and the defendants were present by their attorney Edward Howell;

Thereupon Edward Howell, attorney for the defendants, presented the separate motions for new trial for each of the defendants, and the following proceedings were had, to-wit:

235 Mr. Howell: Defendants offer in evidence in support of their separate motions for new trial the affidavits marked Exhibit "A", Exhibit "B", Exhibit "C", Exhibit "E", Exhibit "F".

Mr. Cutlip: If the Court please, we object to the introduction of Exhibit "A" in evidence, which purports to be and is the affidavit of E. W. Townsend for the reason the same is incompetent, irrelevant and immaterial and for the further reason that the matters and things in said affidavit stated are mere conclusions and not statements of facts and if considered as facts that they are not relevant or pertinent or material to any issue in this case or in support of any ground of the Motion for New Trial. And the same objection without repeating it as to Exhibits "B", "C", "D", "E" and "F" and each and all of said affidavits.

The Court: Objection overruled, they will be admitted.

Mr. Cutlip: Give us an exception to the holding of the Court in the admission of each of the affidavits in support of the Motion for New Trial from "A" to "F" inclusive and each and every of said affidavits.

Mr. Howell: We also offer the motion for new trial as Exhibit "G".

The Court: It will be admitted for the purpose of the Court reading it over and seeing what it is.

Which said Exhibit "G" and Exhibits "A" to "F" inclusive were and are in words and figures as follows, to-wit:

236

"EXHIBIT G."

STATE OF OKLAHOMA,

Pottawatomie County, ss:

In the Superior Court in and for said County and State.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendants,
and A. J. CARNEY.

Motion for New Trial.

Comes now the defendant, Chicago, Rock Island & Pacific Railway Company, and moves the Court to vacate and set aside the verdict and judgment herein rendered on the 26th day of February, 1915,

and to grant a new trial to this defendant for the following causes which affect materially the substantial rights of the said defendant to-wit:

- (1.) Because of irregularity in the proceedings of the Court which this defendant was prevented from having a fair trial.
- (2.) Because of irregularities in the proceedings of the jury which this defendant was prevented from having a fair trial.
- (3.) Because of irregularities in the proceedings of the plaintiff by which this defendant was prevented from having a fair trial.
- (4.) Because of the misconduct of the jury.
- (5.) Because of the misconduct of the plaintiff.
- (6.) Accident and surprise which ordinary prudence could not have guarded against.
- (7.) Excessive damages, appearing to have been given under the influence of passion or prejudice.
- (8.) Errors in the assessment of the amount of recovery 237 that the same is too large and is excessive.
- (9.) Newly discovered evidence, material for this plaintiff which it could not, with reasonable diligence, have discovered and produced at the trial.
- (10.) Errors of law occurring at the trial, and excepted to by the parties defendant.
- (11.) Because this defendant was denied a fair trial under the Constitution of Oklahoma, Article 2, Sec. 7 (Seven) and Art. 2, Sec. 8.
- (12.) Because the defendant was denied a fair trial by being deprived of the Federal right given under the Constitution of the United States and amendments thereto, in denying to it due process of law and the equal protection of the law.
- (13.) That the court erred in refusing to give to the jury instructions requested by the defendants Nos. 1, 2 & 3 and erred in refusing to give to the jury each of said requested instructions, to which the defendants excepted at the time.
- (14.) That the court erred in giving to the jury instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 and erred in giving to the jury each of said instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, to which instructions the defendant excepted at the time.

(15.) That the Court erred in refusing to give to the jury the peremptory instruction to return a verdict for the defendant to which action of the court the defendant excepted at the time.

(16.) Because W. A. Denison, one of the jurors returning the verdict in the cause in favor of the plaintiff and against the defendant, was not a fair, unbiased or impartial juror; that said juror upon his voir dire examination by the defendant stated that he had never had any claim or suit against, or any trouble with, any rail 238 road company, and that he could and would return a fair and impartial verdict under the law and the evidence, and that he had knowledge of nothing which would prevent him from returning a fair and impartial verdict in said cause; that defendant had said time believed said juror's statement, and had no knowledge of any

kind to the contrary; but since said trial and the return of said verdict has learned that said juror was not a fair and impartial juror and should not have been permitted to sit as a juror in said cause; that defendant and its attorneys since said verdict have learned that the said juror did have a claim against the Chicago, Rock Island & Pacific Railway Company, in which he demanded five hundred dollars and which was settled for \$100.00; that said claim was for personal injuries; that said juror had worked for the said defendant Company in its shops at Shawnee, and had been discharged and had attempted to get employment in said shops within the last three months, and had stated in substance that he was barred from employment in said shops, and had threatened the general foreman in said shops with personal violence; that said juror had had difficulty with nearly every foreman in said shops, and that said juror on account of such facts was hostile to the defendant railway company, and not a fair, unbiased and impartial juror; that defendant and its attorneys did not know such facts and the said juror concealed the same; that said juror was for the highest amount which could be given the plaintiff, and influenced the members of said jury by statements to them, as defendant is informed and believes; that if this defendant had known such facts it would have challenged such juror and would not have permitted him to sit as a juror in the case, but that said juror in sitting in said cause prejudiced the rights of this defendant, and prevented this defendant and its evidence from having a fair and impartial trial of said cause; that defendant will support the allegations made herein with oral evidence and with affidavits upon the hearing of this motion for new trial.

Wherefore, for all of above things and matters; affecting its substantial rights, the defendants pray for a new trial of this cause, etc.

C. O. BLAKE,
R. J. ROBERTS,
EDWARD HOWELL.

Attorneys for Defendant, Chicago, Rock Island & Pacific Railway Company.

STATE OF OKLAHOMA,

Pottawatomie County, ss:

Edward Howell, being first duly sworn, upon oath states that he is one of the attorneys for the defendant Chicago, Rock Island & Pacific Railway Company, the defendant above named; that he has read the above and foregoing motion for new trial, and the contents thereof are true as he verily believes.

EDWARD HOWELL.

Subscribed and sworn to before me this March 1, 1915.

[SEAL.]

VERNA WHITESELL,
Notary Public.

Com. Exp. 3-29-18,

"EXHIBIT A."

STATE OF OKLAHOMA,
Pottawatomie County, ss:

240 E. W. Townsend, of lawful age, being first duly sworn, upon oath states; That he is General Car Foreman of the shops of the Chicago, Rock Island & Pacific Railway Company, at Shawnee; that he is well acquainted with W. A. or J. I. Denison, who was one of the jurors in the case of Fred Ward v. said Company and A. J. Carney, tried in the Superior Court of Pottawatomie County, Oklahoma; that he did not learn that said Denison was a juror in said cause until after the verdict was returned in said cause, when he was advised as to the same; that he has known the said Denison for several years, during a part of which time said Denison has been employed in the paint shops, in the back shops and in the blacksmith shops and the boilermaker shops of the said defendant Company; that the said Denison had some kind of trouble with the foreman of each of said shops, and apparently was — a boisterous troublesome disposition; that said Denison was not permitted to work in said shops; that he has made application to this affiant for work in said shops, at a number of times; that he has not obtained work; that he approached this affiant wanting to know why he was kept out of work and was informed by affiant that he could not have work in his department; that affiant is informed and believes that said Denison has stated a number of times that he should have and would beat this affiant up; that affiant believes that said Denison is now and has been for a considerable length of time very unfriendly towards the defendant railway company; and that he could not be a fair and impartial juror in any case in which said Company was concerned; and further affiant saith not.

E. W. TOWNSEND.

Subscribed and sworn to before me this March 1, 1915.

[SEAL.]

VERNA WHITESELL,
Notary Public.

Com. Exp. 3-29-18.

STATE OF OKLAHOMA,
Pottawatomie County, ss:

J. E. Johnston, being first duly sworn, upon oath states: That he is Foreman of the Paint Shops of the Chicago, Rock Island & Pacific Railway Company, at Shawnee, Oklahoma; that he is acquainted with W. A. or J. I. Denison, who worked for the said defendant Company in its shops at Shawnee under this affiant; that said Denison left the said paint shops after attempting to curse and curse this affiant because this affiant had remonstrated with him about

some painting of ears which the said Denison had done; that afterwards the said Denison, so affiant was informed and believes, worked in the back shop and the blacksmith shops of said defendant company at Shawnee, and had applied for a job under this affiant; that the last attempt of the said Denison to obtain employment under this affiant was about two or three months ago; that affiant is informed and believes that the said Denison has constantly attempted to shift from one employment in said shop to another and that he has had trouble with every foreman under whom he has worked and is of a loud mouthed and boisterous disposition; that affiant about a month ago, or in December, 1914 or January 1915, heard said Denison state that he was going to or should beat E. W. Townsend, the general car Foreman at said Shops, because the said Townsend had barred him (Denison) from working in said shops at all; that affiant believes from the conduct and actions of the said Denison that he has been for a long time and is now very unfriendly to the Chicago, Rock Island & Pacific Railway Company, and that in any case in which the said Company was a defendant, the said Denison would be a very unfair and biased juror; that affiant

242 did not know that the said Denison was a juror in the case of Fred Ward v. said Company and A. J. Carney until after the verdict in said cause was returned, when he was informed of the same; and further affiant saith not.

J. E. JOHNSTON.

Subscribed and sworn to before me this March 1, 1915.

[SEAL.]

VERNA WHITESELL,
Notary Public.

Com. Exp. 3-29-18.

“EXHIBIT C.”

STATE OF OKLAHOMA,

Pottawatomie County, ss:

J. M. Dabbs, being first duly sworn upon oath states: That he is Foreman of the gang in the Backshop of the Chicago, Rock Is'and & Pacific Railway Company in Shawnee, Oklahoma; that he is acquainted with E. A. Denison who was one of the jurors in the trial of the case of Fred Ward v. Chicago, Rock Island & Pacific Railway Company in the backshop of defendant railway company in Shawnee under this affiant; that said Denison quit said employment, but has made application for employment several times within the last year from this affiant; that said Denison was of a boisterous, troublesome disposition, and affiant believes that in any case in which the said Railway Company was interested, the said Denison would not and could not be a fair and impartial juror, as affiant believes he is sore at said Company and its foreman because he has not gotten employment at the said company's shops; and further affiant saith not.

J. R. DABBS.

243 Subscribed and sworn to before me this March 1, 1915.

[SEAL.]

VERNA WHITESELL,

Notary Public.

Com. Exp. 3-29-18.

"EXHIBIT D."

STATE OF OKLAHOMA,

Pottawatomie County, ss:

C. C. Butler, being first duly sworn, upon oath states: That he is Foreman of the Boilermaker shops of the Chicago, Rock Island & Pacific Railway Company, in Shawnee, Oklahoma; that he is acquainted with W. A. Denison, who worked in said boilermaker shops in Shawnee under this affiant; that he is informed that the said W. A. Denison was one of the jurors in the case recently tried in the Superior Court at Shawnee being the case of Fred Ward v. said railway company and A. J. Carney; that the said Denison has attempted several times during the past year to get a position in the shops at Shawnee, under this affiant; that this affiant did not desire to employ the said Denison and so informed him; that said Denison was and is of a quarrelsome and faultfinding disposition and was continually fussing about the shops and the defendant railway Company; that affiant believes that the said W. A. Denison was and is prejudiced against the defendant railway company and that the said Denison could not and would not be a fair and impartial juror in any case for personal injuries against said defendant railway company; and further affiant saith not.

C. C. BUTLER.

Subscribed and sworn to before me this March 1, 1915.

244

[SEAL.]

VERNA WHITESELL,

Notary Public.

Com. Exp. 3-29-18.

"EXHIBIT E."

STATE OF OKLAHOMA,

Pottawatomie County, ss:

J. H. Brown, of lawful age, being first duly sworn, upon oath states: That he is Blacksmith foreman of the shops of the Chicago, Rock Island & Pacific Railway Company, in Shawnee, Oklahoma; that he is well acquainted with W. A. Denison, who was one of the jurors in the case of Fred Ward v. said Company and A. J. Carney, recently tried in the Superior Court of Pottawatomie County, Oklahoma; that the said W. A. Denison was working at said shops when there occurred an explosion of a boiler in said shops and the said Denison claimed he was injured in said explosion, and put in a claim for money damages against said company for \$500.00; that said claim was afterwards settled with the said Denison for the sum of \$100.00; that the said Denison was working for said Company in the blacksmith shop of defendant company, and has worked in several

of the other shops of said company at Shawnee; that the said Denison is of a quarrelsome disposition, and has either resigned or been discharged in all instances; that he has made application to this affiant for re-employment but affiant would not re-employ him; that affiant believes that the said Denison is unfriendly to said Company and could not and would not be a fair and impartial juror in any case against said Company for personal injuries or otherwise; and further affiant saith not.

245 J. H. BROWN.

Subscribed and sworn to before me this March 1, 1915.

[SEAL.]

VERNA WHITESELL,
Notary Public.

Com. Exp. 3-29-18.

“EXHIBIT F.”

STATE OF OKLAHOMA,
Pottawatomie County, ss:

E. J. Smith, of lawful age, being first duly sworn, upon oath states: That he has worked at the paint shop of the Chicago, Rock Island & Pacific Railway Company at Shawnee, Oklahoma, having charge of the paint shop stock room; that he is well acquainted with J. S. or W. A. Denison who was a juror as affiant is informed in the case of Fred Ward vs. Chicago, Rock Island & Pacific Railway Company, et al., that the said Denison worked in the paint shop and this affiant has heard the said Denison curse the foreman and the employes of said shop and curse said shops and the said railway company; that the said Denison had worked in practically every department in said shops and under the various foremen, but was so unruly and boisterous that they had not retained him; that he had frequently been to the paint shop to get work and had been refused and that his cursing and statements in regard to the foreman, employes, said shops and said railway company were made in connection with statements with reference to his not being able to go to work; that affiant believes that the said W. A. Denison had been and is now sore at said company and its shops, and that he would not be a fair 246 and impartial juror in any case in which the defendant company was a party defendant; that affiant has heard the said Denison threaten to sue said company, and further affiant saith not.

ENOCH J. SMITH.

Subscribed and sworn to before me this 1st day of March, 1915.

[SEAL.]

VERNA WHITESELL,
Notary Public.

My Com. Exp. March 29, 1915.

(Endorsed on back:) No. 2114. In Superior Court. Fred Ward vs. Chicago, Rock Island & Pacific Railway Co., et al. Motion for New Trial for Chicago, Rock Island & P. Ry. Co. Filed Mar. 1, 1915, in Superior Court, Pottawatomie County. R. L. Flynn, Court Clerk, by R. L. F., Deputy. C. O. Blake, R. J. Roberts, & Edward Howell, Att'y's.

Mr. Cutlip: We offer Mr. Bell's testimony to show he stated to the jurors in the jury room that he had had a demand against the Railroad Company and it had been settled satisfactory and he had no bias or prejudice against the Railroad Company or that in substance to that effect.

Mr. Howell: We object to the offer of the evidence of the juror for the reason it is incompetent, irrelevant and immaterial.

The Court: You may proceed with the question, objection overruled.

Mr. Howell: To which ruling the defendants except.
247 The Court: The Court is of the opinion there should be no evidence admitted to impeach the verdict of the members of the jury that was on the jury panel, but the evidence of persons in the Court room on the voir dire examination would be competent on that question if the record was not kept.

W. A. DENISON, being first duly sworn, and called as a witness on behalf of the plaintiff, testified as follows on Direct Examination.

By Mr. Cutlip:

Q. State your name to the Court.

A. W. A. Denison.

Q. You live in Shawnee?

A. Yes, sir.

Q. How long have you been living here?

A. About six years.

Q. Are you acquainted with Fred Ward?

A. No, sir.

Q. Were you called as a juror and accepted as a juror in the case of Fred Ward, Plaintiff, vs. Chicago, Rock Island and Pacific Railway Company and A. J. Carney, defendants tried in this Court on the 24th day of February, 1915?

A. Yes, sir.

Q. Were you asked on your direct examination or on the voir dire as they general- call it as to your qualification and competency as a juror? Were you interrogated by attorneys for plaintiff and attorneys for defendants?

A. Well, tell what I was asked?

Q. No, answer yes or no whether you was asked by either party?

A. Yes, sir.

248 Q. I will ask you to state whether or not in that examination you were asked this question, at least in substance, as to whether or not you had ever been in the employ of the Rock Island Railway Company?

A. Yes, sir.

Q. State what your answer to that question was?

A. Well, I told him I had.

Q. I will ask you to state whether or not you were asked by either the attorneys for the plaintiff or the defendants as to whether or not you had ever had a claim or demand against the railway company?

A. Yes, sir.

Q. You was asked that question, were you?

A. Yes, sir.

Q. What was your answer in response to that?

A. I told them I settled it with the claim agent; I told them I settled it.

Q. You had a claim against the company?

A. I didn't have when I was on the jury; I had had.

Q. You had had?

A. Yes, sir.

Q. I ask you to state whether or not you stated in substance you had a claim against the company prior to the time you were called as a juror, but had been settled and compromised by you with the company?

A. Yes, sir.

Q. Was this question and was this answer made to this question, were they true as you answered them?

A. Yes, sir.

Q. And did you answer these questions at that time the same way or in substance as you have answered them now?

A. Yes, sir.

249 Q. Did you have, at the time you were called as a juror in the case No. 2114 a claim or demand against the Rock Island Railway Company for any injury received?

A. No, sir.

Q. And did you so state that fact?

A. Yes, sir.

Q. And to the Court?

A. Yes, sir.

Q. What is your answer?

A. Yes, sir.

Q. And was that answer at that time true?

A. Yes, sir.

Q. And it is true now?

A. Yes, sir.

Q. Now, you were one of the jurors who tried this case in this Court?

A. Yes, sir.

Q. Did you state to the—in substance to the jury or to any member of the jury while deliberating on the verdict that you had had a claim or demand against the Rock Island Railway Company for damages but the same had been settled satisfactory to you long prior to the time that you were deliberating on this verdict? Answer yes or no.

Mr. Howell: Objected to as incompetent, irrelevant and immaterial.

A. Well, I don't know.

The Court: Wait a minute, Mr. Denison; it is a very close question whether or not you can go into the question with the juror himself and have him tell what action he took. It is a very close question whether a juror can be compelled—put on a witness stand and

250 be compel-ed to answer a question as to what he did in arriving at a verdict. However, I will permit this to be answered. Objection overruled.

Mr. Howell: To which ruling the defendants except.

A. I didn't.

Q. You didn't?

A. I didn't say anything at all about it.

Q. Well, I will ask you to state, Mr. Denison, whether or not you are acquainted with E. W. Townsend?

A. Yes, sir.

Q. Were you acquainted with him on and prior to the 24th of February, this year?

A. Yes, sir, I — been acquainted with him about four or five year.

Q. Were you ever employed by the Rock Island Railway Company under this man Townsend as foreman of any of the so-called Rock Island—(they call it gangs here, your honor, in one of these affidavits) ?

A. Yes, sir, I have been employed under him.

Q. Would the fact, if true, that you had trouble and words with E. W. Townsend as an employee of the Rock Island Railway Company cause you to have any prejudice against the defendants in this case?

Mr. Howell: Just a moment. We object to question as leading and suggestive; incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Howell: To which ruling the defendants excepts.

A. I never had any trouble with old man Townsend in my life.

The Court: The question was if you had had.

A. No, sir, it wouldn't effect me a bit.

251 Q. Were you acquainted with J. E. Johnston on or prior to the 24th of February?

A. Yes, sir.

Q. Is he an employee of the Rock Island Railway Company?

A. Yes, sir.

Q. In what capacity is he employed?

A. Paint foreman.

Q. Did you ever have any difficulty with Mr. Johnson?

A. Well, a few words.

Q. Would the fact that you had some misunderstanding with Johnson, an employee of the Rock Island Railway Company effect your verdict one way or the other in the case of Ward vs. Chicago, Rock Island & Pacific Railway Co.?

A. No, sir.

Mr. Howell: Objected to as calling for conclusion of witness, incompetent, irrelevant and immaterial.

The Court: The position of the Court is going to be that there is just one issue you can try on this proposition; that is just one ques-

tion, if this juror corruptly kept hidden in his voir dire examination some fact in his knowledge if he had been questioned about it, then that can be determined here. What might or might not have effected his action on that jury is an incompetent question. The question is whether or not he was thoroughly and fairly examined. That is the issue, and the juror, they must examine him thoroughly and give him an opportunity to disclose his opinion and that question is the only question that can be asked this witness. Objection sustained.

252 Q. Mr. Denison, during the time *they* you were being examined as to qualification as a juror in this case, I will ask you to state whether or not there was any question that was asked you by the counsel for either party and to which you made reply that was in any way untrue?

Mr. Howell: Objected to as calling for a conclusion of witness, witness can state what questions were asked and answered.

The Court: Objection sustained as calling for conclusion.

Mr. Cutlip: To which ruling the plaintiff excepts.

Q. Do you remember, Mr. Denison, what questions were propounded to you by the attorneys for the defendants, the Rock Island Railway Company?

A. Yes, sir.

Q. And who was the attorney that propounded those questions to you?

A. That fellow.

The Court: Mr. Howell?

A. Yes, sir. Mr. Howell and Mr. Pendleton.

Q. I mean for the defendant, now, Mr. Pendleton represented the Plaintiff?

A. I say Mr. Howell there.

Q. Mr. Howell?

A. Yes, sir.

Q. Do you know whether—then state the substance of the questions that were asked you and the answers that you gave thereto with reference to your having had trouble with the railway company and whether or not it had been satisfactorily disposed of and whether there were any matters or things which were kept back

253 by you about which you were interrogated which would in any wise influence you in arriving at a verdict in this case.

State in your own language.

A. He asked me if I ever worked for the Rock Island Railway Company. I said, "yes, sir."

Q. Who asked you that, Mr. Howell?

A. Yes, sir. He asked me how long I had worked for them and I told him I couldn't tell, a right smart while. He asked me how long I quit, and I told him over two years, and he asked me if I had any trouble with the company, and I said no, I hadn't. He never asked me if I had any trouble with the bosses, and I didn't tell him.

That wouldn't make me hold anything against the company, and never will.

Q. Were you at that time acquainted with Mr. Carney, one of the defendants?

A. No, sir.

Q. You may state whether or not you had at that time or prior thereto any trouble personally with the defendant, A. J. Carney?

A. No, sir.

Q. Go on with your statement?

A. Well, I believe that is all I was asked and all I answered.

The Court: Was you asked anything about a claim?

A. Yes, sir, he asked if I had ever had a claim with them, and I said, "yes, I had a claim and settled it with the claim agent. I did. The claim agent offered me a certain price, and I told him I would take it and that was all there was to it.

Q. You answered, Denison, that if you was accepted as a juror in the trial of this case that you would return a fair and just verdict as you saw it under the law and the evidence, did you?

254 A. Yes, sir; and I tried to.

Q. Was you asked this question, if you knew of anything that would prevent you from returning a fair and just verdict between the plaintiff and defendant?

A. I don't know I was asked that.

Q. Did you know anything to prevent you doing so at that time?

A. No, sir, I don't, I did not.

Q. Mr. Denison, previous to that time you had been on juries in this Court in which the Rock Island had been a defendant, had you not?

A. Yes, sir, I had been on a jury last year, a damage suit, a fellow sued the Rock Island Company for loss of goods or he got them damaged, I forgot how it was.

The Court: That is not important.

Mr. Howell: We object to that.

Mr. Pendleton: The point is he was not prejudiced then and returned a verdict for the defendant.

The Court: That would not be competent. The only question is did this or any other juror lie on his voir dire.

Q. I will ask you to state whether or not you was a juror in the case of—and retained by the company in the case of Hughes against the Rock Island subsequently tried?

A. No, sir, I was up there but I got excused.

Q. You got excused.

Mr. Pendleton: We offer now to prove by the juror that about a year ago in a trial in this Court wherein a certain party whose name

-255 is to the witness juror not now remembered, this juror was accepted as a juror in that case and that after hearing all the evidence the jury brought in a verdict for the defendant, the Rock Island Railway Company.

Witness: Yes, sir.

Mr. Pendleton: We offer that.

Mr. Howell: Objected to as incompetent, irrelevant and immaterial, to remote and indefinite.

The Court: Objection sustained as incompetent.

Mr. Pendleton: To which ruling the plaintiff excepts.

Take the witness.

Cross-examination.

By Mr. Howell:

Q. Mr. Denison, how many cases in which the Rock Island Railway Company was a defendant at the January, 1915, term of the Superior Court were you called as a juror?

A. I don't know.

Q. You were called as a juror in the Francis case, Francis vs. the Rock Island?

A. Yes, I believe I was on that jury.

Q. You were a juror in the case of Ward vs. Rock Island?

A. Yes, sir.

Q. You were a juror in the case of Penix vs. Rock Island?

A. No, sir.

Q. You were not a juror in the case of Hughes vs. Rock Island?

A. No, sir.

Q. Mr. Denison, isn't it a fact in the case of Hughes vs. The Rock Island was the first time that you stated that you had had a claim, when you were being examined as a juror, was the first time you had stated you had a claim against the Chicago, Rock Island & Pacific Railway Company, which you had settled?

256 A. No, sir, you were asking me sitting right over there and I told you I settled with the Claim Agent.

Q. You are not distinct in your recollection at this time as to what examination you had as a juror in the case of Ward vs. Rock Island?

A. Yes, sir.

Q. You are sure you made the statement to me examining you at that time?

A. Yes, sir.

Q. With reference to having a claim against the Rock Island?

A. Yes, sir; I think I did.

Q. You are not absolutely sure of that, are you, Mr. Denison?

A. Well, I don't—I am pretty sure of it I answered it. It seems to me like I did. It seems to me like you asked me questions and I answered it.

Redirect examination.

By Mr. Cutlip:

Q. The case of Francis vs. Rock Island Railway Company was tried prior to the Ward case, was it not?

A. I wasn't in that case at all.

Q. I thought you said you were a juror?

A. Yes, I think I was, I am not for sure about that. I might not have been. No, I wasn't called there and excused. I know if I was

on there I stayed until it was over. I wouldn't be sure I was on ~~there~~ or not.

Recross-examination.

By Mr. Howell:

Q. Mr. Denison, in your examination as a juror in the Ward ~~case~~ you stated you had worked for the Frisco in Missouri, didn't you?

A. Yes, sir.

257 That is all.

Redirect examination.

By Mr. Cutlip:

Q. Was that statement untrue?

A. No, sir; I worked for the Frisco.

EDWARD HOWELL being first duly sworn, and called as a witness on behalf of the defendants, testified as follows on Direct Examination.

My name is Edward Howell, I assisted in the trial of the case of Ward against the Rock Island and A. J. Carney, which was tried in the Superior Court of Pottawatomie County, in the month of February, 1915. While assisting in the trial I questioned the jurors empaneled and offered for the purpose of selecting a jury for the trial of the case. I remember distinctly questioning Mr. W. A. Denison for the reason that he was the only juror who stated that he had worked as a switchman and for the reason that he stated he was the only juror who had worked for a railway company and I remember particularly the examination on that account with reference to Mr. Denison. The usual and ordinary questions were asked Mr. Denison and in the examination of the jurors when I found Mr. Denison had worked for a railway company and been a switchman, had worked for the Frisco and also for the Rock Island, I was more particular in his examination than in others. I asked Mr. Denison, together with the other jurors whether or not—which question was a general question—whether or not they had ever had a suit or claim against or any controversy with any railway company. Mr. Denison did not answer this question. If he raised his hand indicating that he had my attention was not called to 258 it and I knew nothing of it. I did not learn that Mr. Denison had ever had any claim against the Rock Island Railway Company until after the verdict in this case had been returned when I then learned through some of the witnesses—

Mr. Cutlip: Object to that.

That Mr. Denison had had a claim against the Chicago, Rock Island and Pacific Railway Company, when the boiler exploded and the same had been settled. I remember distinctly the reason Mr. Denison was left on the jury was because he stated—

Mr. Cutlip: Object to why he was left on the jury as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Howell: To which ruling the defendants except.

Mr. Denison did not state—did not indicate that he had ever had any trouble with any company, railway company or claim against any railway company but did state substantially that he had worked as a switchman and as this was a switching case and he stated that—stated all the questions which were asked him favorably he was not excused. The attorneys for the defendant railway company and A. J. Carney did not learn of the facts set out in its motion for new trial.

Mr. Cutlip: Are you going to limit it to the examination of this witness and not generally?

The Court: Objection overruled.

Mr. Cutlip: To which ruling the plaintiff excepts.

The attorneys for the defendant did not learn—the attorneys, who were Mr. R. J. Roberts and myself, did not learn anything of the facts stated in the affidavits or Motion for New Trial until after the verdict had been rendered and immediately upon learning of the same and in order to verify—and as soon as same could be verified got the affidavits which have been introduced in evidence.

Cross-examination.

By Mr. Cutlip:

Q. Mr. Howell, you are positive now that Mr. Denison stated on his voir dire that he had ever worked for the Rock Island as a switchman?

A. He didn't state he worked for the Rock Island as a switchman, he stated he worked as a switchman for the Frisco in Missouri.

Q. But he did state he had worked as a switchman for the Rock Island here?

A. No, sir, he stated he worked in the paint shop for the Rock Island.

Q. You state now your recollection is he did not indicate to you that he ever had a claim or demand against the Rock Island Railway Company?

A. I examined Mr. Denison very carefully and know that he did not state that and did not even indicate that he had had any claim against the Rock Island. The first time I knew of it was when I learned after the trial of this case and the first time Mr. Denison said anything about it was shortly before the Hughes jury was called and on the examination as a juror in the Hughes jury Mr. Denison did state he had a claim with the Rock Island and that claim had been satisfactorily settled in the Hughes case.

Q. Isn't it a fact upon the examination of Mr. Denison on the Voir Dire, Mr. Pendleton, who examined the jurors in that case,

asked Mr. Denison pointedly if he had ever worked for the Rock Island and whether or not he had ever been injured and had a claim against the Rock Island and in which he answered that he had worked for the Rock Island as a painter and also that he had 260 received some injury in the Boiler explosion, that he had filed a claim which had been settled satisfactorily with the company and himself?

A. I remember Judge Pendleton asking Mr. Denison about working for the Rock Island. I don't remember of Judge Pendleton having asked Mr. Denison in regard to having been injured or having made a settlement with the Rock Island with reference to any injury.

Q. That is your recollection now?

A. That is my recollection now and I am satisfied that is the fact.

Q. If Mr. Pendleton asked those questions you do not now recall it?

A. I don't think he asked them.

Q. Very well. Who was the claim agent for the Rock Island Railway in 1913, I believe it was when the boiler explosion or 1912?

A. That boiler explosion, if I remember, was some time in 1910 or 1911, isn't that right Mr. Denison, 1910 or 1911.

Q. Who was the claim agent at that time?

A. Mr. L. T. Shedd.

Q. It wasn't your present claim agent?

A. No, sir, Mr. Hardcastle wasn't the claim agent then.

Q. When did he come on the job?

A. He has been claim agent for eight or ten years but he came here in January, 1914, is my recollection, not before that; might have been a short time before that but just a short time before.

That is all.

Mr. Howell: I talked with Mr. Roberts and know that 261 he will testify and offer his evidence along these lines, that he was present at the time of the examination of Mr. Denison, juror in the case of Ward vs. Rock Island and A. J. Carney. That in the examination it did not develop from Mr. Denison that he had ever had a claim against the Rock Island Railway Company or had had any controversy with the Railway Company. That those questions were asked Mr. Denison and that his response with reference thereto did not indicate that he had had any such claim or had had any trouble with the said Company. That from his responses it appeared that Mr. Denison had worked for a railroad company in Missouri and had also worked for the Rock Island Company in the paint shop. That he had made application for work in the Rock Island shops—

Mr. Cutlip: Object to that now.

Mr. Howell: I remember that myself too. And that he did not learn of the facts stated in the affidavits and in the Motion for a New Trial so that the same could be presented to this court until after the verdict in this case was rendered. I offer to prove that by Mr. Roberts.

Mr. Cutlip: Object to that because it is incompetent irrelevant and immaterial, particularly that part of it which goes to his statement that he had not worked as an employe in the paint shops.

The Court: He said he had worked.

Mr. Cutlip: Move to strike that out as incompetent, irrelevant and immaterial, his application for work.

262 The Court: Objection sustained. That wouldn't be competent.

Mr. Howell: I want to make this statement under oath. I desire further to state that Judge Pendleton in examining Mr. Denison asked him whether or not he had made application for employment at the Rock Island shops and Mr. Denison said he had not.

Mr. Cutlip: Move to strike that out for the reason the same is incompetent, irrelevant and immaterial.

The Court: Motion overruled.

Mr. Cutlip: To which ruling the plaintiff excepts.

The Court: The question is what were the questions put to him and did he have a fair chance to answer them and if he did did he lie. That is all there is to it.

W. S. PENDLETON, being first duly sworn, and called as a witness on behalf of the plaintiff, testified as follows on Direct Examination:

By Mr. Cutlip:

Q. State your name?

A. W. S. Pendleton.

Q. You are a practicing attorney at this bar, are you?

A. Yes, sir.

Q. You are one of the attorneys that conducted the trial of the case for the plaintiff, in fact did conduct it of Ward vs. Chicago, Rock Island & Pacific Railway Company, did you not?

A. Yes, sir.

Q. Were you at that time acquainted with W. A. Denison?

263 A. No, sir, the first time I ever saw him was on the jury to know him.

Q. I ask you whether or not as an attorney for the plaintiff you interrogated the jurors on their voir dire in that case?

A. Yes, sir.

Q. Do you remember whether or not you interrogated the juror Denison on his voir dire?

A. Yes, sir.

Q. For the plaintiff?

A. Yes, sir.

Q. Do you remember what his statements were with reference to whether or not he had been employed by the Rock Island Railway Company and whether or not he had ever had a claim or demand there against and disposition made of that? Answer yes or no.

A. Yes, sir, I remember that.

Q. State what that was?

A. He stated he had been employed by the Rock Island Company

for some time, I think two or three years, I don't remember the time and that he had had a claim. I asked him the question whether he had had a claim against the Rock Island Company. He said he had one and I asked him if it had been settled satisfactorily and he said it was. I remember distinctly I went down the roll and first found out who was the men who worked for the Rock Island Company. Mr. Wheeler was the second or third man and I asked Mr. Wheeler that.

The Court: Confine your testimony to Dennison. It is not necessary to tell your reasons.

A. I was going to show your Honor how I happened to remember these circumstances. I remember distinctly as to Wheeler and Denison both, asking these questions. We discussed it and excused Wheeler and thought we would have to excuse Denison because they left him on.

264 The Court: What did you ask Mr. Denison?

A. I asked him if he ever had a claim against the company and he said he had and asked him if it had been settled satisfactorily and he said yes.

Q. I ask if you asked this question? Do you know any reason why you can't try this case fairly and impartially according to the law and evidence?

A. I asked that of every juror.

Q. Do you remember this juror?

A. I asked every juror that. Every one that stayed on the jury answered that he could try the case fairly and impartially.

The Court: Judge, did or did not Mr. Denison in that examination occupy the second chair from the north on the front row?

A. Yes, sir, second or thirs. Third, right along there, two or three from there.

Q. That is all I want to know.

A. Wheeler was in there where Mr. Bailey is now and both worked for the Rock Island.

Q. So had Mr. Bryant?

A. Yes, sir, so had Mr. Bryant. I didn't ask him particularly.

Cross-examination.

By Mr. Howell:

Q. Do you remember Mr. Denison stated he had worked as a switchman for the Frisco in Missouri?

A. Just he worked in some capacity.

Q. Do you know that after he made that statement I made a long and extended examination of Mr. Denison, longer than I did of any other jurors?

A. You made an extended examination, I remember that.

265 Q. Longer than I did other jurors?

A. I don't remember that.

Q. Do you remember my asking the question as to whether or not he had a claim against the Rock Island?

A. I know you examined him regarding that. I remember I asked him about that.

Q. You remember what he answered?

A. Yes, sir.

Q. You remember he answered he had a claim?

A. I remember I thought you were satisfied with the juror and we would have to excuse him.

Q. You know he stated he had been a switchman in Missouri?

A. I don't deny that he stated he had been employed by the Frisco.

Q. He was the only juror on the jury that was finally accepted that had ever worked as a switchman for any railroad company?

A. Yes, sir, as far as I know; as far as I remember that is all.

Redirect examination.

By Mr. Cutlip:

Q. Mr. Pendleton, you state, do you positively remember now he stated he worked for the Frisco as a switchman?

A. No, sir, I don't know he worked as a switchman, he worked for some road in Missouri in some capacity.

Q. Isn't it a fact he did state he worked for the Frisco as a section hand in Missouri, and also on the train but not as a switchman?

A. I don't remember, I don't remember that being of any importance at that time.

The Court: It is hereby agreed by and between counsel for 266 plaintiff and defendant here in open court that if R. J. Roberts was here he would testify to the matters set out and stated by Mr. Howell in his statement.

Mr. Cutlip: Now comes the plaintiff and moves the Court to strike from the consideration of this Court all questions upon the hearing with reference to statement of witness as to what Denison stated as to being a switchman or an employee of the Frisco Railway Company in the State of Missouri for the reason the same is incompetent, irrelevant and immaterial and not germane to any issue in this hearing.

The Court: Motion overruled.

Mr. Cutlip: To which ruling the plaintiff excepts.

And thereupon the Court made the following order, to-wit:

Now at this time the Court is of the opinion that the separate motions for new trial of the defendants, Chicago, Rock Island & Pacific Railway Company and A. J. Carney, should be and each of them, are hereby overruled, to which action of the Court in overruling the said separate motions for new trial the defendants, and each of them, except; and thereupon the Court finds that the plaintiff upon the verdict rendered, should have judgment against the defendants, and each of them, for the sum of \$3000.00, together with interest thereon

from the 26th day of February, 1915, and all costs, to which action of the Court in entering judgment upon said verdict the defendants, and each of them, except.

And thereupon for good cause shown, it is ordered that the time for defendants, and each of them, to make and serve case-made for appeal to the Supreme Court in the above entitled cause be, and the same is hereby extended 90 days from this date, plaintiff to have

10 days after service of said case-made to make suggestions
267 of amendments thereto and the said case-made to be settled upon five days written notice by either party; and upon application the defendants are given 30 days from this date in which to file supersedeas bond in the sum of \$6500.00, and execution is stayed in this cause pending the said 30 days, and thereafter pending said appeal and determination of said cause in the event the said bond shall be filed within said 30 days.

And it is ordered by the Court that upon application of the defendants that the defendants, and each of them, be and are hereby given 5 days within which to file a bill of exceptions containing the proceedings for the hearing of the separate motions for new trial of the defendants.

And inasmuch as the proceedings, evidence, objections, rulings, exceptions and orders contained in the foregoing bill of exceptions do not appear on record in this cause, I hereby certify that the above and foregoing is a full, true, correct and complete bill of exceptions and transcript of all the proceedings, orders, exceptions, rulings, exhibits, of the hearing upon the separate motions for new trial in the case of Fred Ward vs. Chicago, Rock Island & Pacific Railway Company and A. J. Carney, and that this bill of exceptions presents fully and correctly the rulings of the Court and all the proceedings at the hearing upon said separate motions for new trial, and I hereby sign and settle the same as a true and correct bill of exceptions of said proceedings and hereby order that the same be filed and made a part of the record in this cause.

This 13th day of March, 1915.

LEANDER G. PITMAN,
Judge of Superior Court.

Attest.

R. L. FLYNN,
Court Clerk.

By E. WILLETT,
[SEAL.] *Deputy.*

268 Endorsed: On inside of last page:—Filed Mar. 15, 1915.
In Superior Court Pottawatomie County, Okla. By E. Willett, Deputy.

STATE OF OKLAHOMA,
Pottawatomie County, ss:

In the Superior Court in and for Said County and State.

I, Chas. E. Carter, hereby certify that I was the stenographer appointed by the Court and acting as special stenographer in the matter of the hearing of Motion for New Trial in case of Fred Ward vs. Chicago, Rock Island & Pacific Railway Company and A. J. Carney, #2114, in the Superior Court of Pottawatomie County, State of Oklahoma, on the 10th day of March, 1915, and that the above and foregoing transcript is a full, true and complete transcript of all the evidence, objections, motions, rulings, exceptions and such other matters as I was called upon to take in the hearing on said motion as the same was taken down by me in shorthand and afterwards reduced by me to writing.

CHAS. E. CARTER.

Subscribed and sworn to before me this 12th day of March, 1915.

[SEAL.]

R. L. FLYNN,
Court Clerk,

By — — —, *Deputy.*

Endorsed: 2114. Fred Ward vs. C., R. I. & P. Ry. Co. Filed March 15, 1915. R. L. Flynn Court Clerk by E. Willett, Deputy.

269 That thereafter and on the 18th day of March, A. D. 1915, there was filed with the Clerk of the above named Court, a journal entry overruling motion for new trial, which journal entry is in words and figures as follows, to-wit:

270 STATE OF OKLAHOMA,
Pottawatomie County, ss:

In the Superior Court in and for Said County and State.

No. 2114.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and A. J. CARNEY, Defendants.

Journal Entry Overruling Motion for New Trial.

Now on this 26th day of February, 1914, came the plaintiff in person and by his attorneys, W. S. Pendleton and T. G. Cutlip, and also came the defendants by their attorneys, R. J. Roberts and Edward Howell and the above entitled cause came on for trial in its regular order before a jury of twelve good men, who having been

duly empaneled and sworn, well and truly to try the issues joined between plaintiff and defendant, and a true verdict render according to the evidence, and having heard the evidence, the charges of the Court and the argument of counsel, upon their oath, do say:

"Verdict.

We, the Jury empaneled and sworn in the above entitled case, do upon our oath find for the Plaintiff and assess the amount of his recovery at \$3,000.00.

V. V. JONES, *Foreman.*
W. A. DENISON.
W. E. CALAHAN.
W. A. DEISTA.
N. P. BELL.
W. A. MOORE.
H. E. HILTON.
J. R. ALEXANDER.
E. E. BRYANT."

And thereafter on the 1st day of March, 1915, and within three days from the time of the returning of said verdict the defendants, and each of them, filed their separate motions for new trials, and thereafter on the 10th day of March, 1915, said separate motions for new trial of the defendants coming on for hearing and the Court being advised in the premises, finds that said separate motions for new trial of the defendants, and each of them, are not well taken and that each of them should be overruled; to which defendants and each of them excepted;

It is therefore ordered, adjudged and decreed by the Court that the motions for new trial of the defendant, Chicago, Rock Island & Pacific Railway Company, and the defendant, A. J. Carney, be, and each of them are hereby overruled, to which action of the Court the defendants, and each of them, excepted at the time;

And it is further ordered, adjudged and decreed by the Court that the plaintiff do have and recover of and from the said defendants, and each of them, the sum of \$3,000.00, together with interest thereon from the 26th day of February, 1915, at the rate of six per cent per annum, and for all costs herein, taxed at \$—, to which in so entering judgment, the defendants, and each of them, excepted at the time.

And now on said 10th day of March, 1915, upon the application of the defendants, and for good cause shown, the time within which defendants may prepare and serve case-made in this cause for appeal to the Supreme Court of the State of Oklahoma, is extended 90 days, and the plaintiff is given by the Court 10 days after service of said case-made in which to suggest amendments thereto, said case-made to be settled and signed upon five days' notice thereafter by either party.

And for good cause shown, upon application of the defendants, it is hereby ordered that execution be stayed in this cause for 30 days, and thereafter pending the filing of the appeal by the defendants of

this cause in the Supreme Court of the State of Oklahoma, and its pendency for determination therein, upon the defendants within 30 days from this date filing in this Court a good and sufficient supersedeas bond in the sum of \$6,500.00, conditioned as required by law, with surety to be approved by the Clerk of this court.

LEANDER G. PITMAN,
Judge of the Superior Court.

Endorsed: No. 2114. In the Superior Court. Fred Ward, Plaintiff vs. Chicago, Rock Island & Pacific Railway Company and A. J. Carney Defendants. Journal Entry Overruling motion for new trial. Filed Mar. 18, 1915. In Superior Court Pottawatomie County, Okla. R. L. Flynn, Court Clerk. By R. L. F.

272 The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made and all rulings and orders made thereon; all exceptions taken by the defendant to such rulings and orders; exceptions by plaintiff; all the evidence offered, introduced or received upon the trial and the rulings of the court thereon and the exceptions taken thereto; all admissions and agreements; all the instructions offered by either party and refused by the court and all instructions given to the jury by the court; the verdict of the jury and the judgment of the court thereon and all costs, and all exceptions to the same; and the same is a true, full and complete and correct copy statement and transcript of all the pleadings, motions and all the evidence, rulings, orders, findings, judgment and proceedings in said cause.

273 That thereafter on the 8th day of June, 1915, and before the expiration of the time theretofore given in which to prepare and serve case-made in the above entitled cause, the defendants filed their motion for an order extending the time in which to prepare and serve case-made for suggestions thereto and settling, which motion is in words and figures as follows, to-wit:

274 STATE OF OKLAHOMA,
Pottawatomie County, ss:

In the Superior Court in and for Said County and State.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY et al.,
Defendants.

Motion for Further Extension of Time.

Comes now the defendants and respectfully shows to the Court that the instructions in the above entitled cause given by the Court have become misplaced and cannot be found; that it is necessary in order to have the opportunity to find said instructions and incorpo-

rate them in the case-made, to have the time in which to prepare and serve case-made, suggestions thereto and settling, extended:

Therefore defendants pray that this court make its order extending the time in which defendants may serve case-made for the appeal of said cause thirty days, for the expiration of the time heretofore given the plaintiff to have ten days after said service in which to make suggestions of amendments, the same to — settled thereafter upon five days' notice by either party; and that the time in which to file petition in error in the supreme court be extended thirty days, for the expiration of the time heretofore given and for such other and further order as may seem just to the court, etc.

C. O. BLAKE,
R. J. ROBERTS,
EDWARD HOWELL,
Attorneys.

Endorsed: No. 2114—In Supreme Court—Fred Ward vs. Chicago, Rock Island & Pacific Ry. Co.—Motion for Extension of time. Filed in Superior Court—June 8, 1915—Pottawatomie County Okla. R. L. Flynn, Court Clerk, by Harry Watts, Deputy.

275 Thereafter on said motion the Court made its order extending the time in which to make and serve case-made for suggestions of amendments and settling said case, which is in words and figures as follows, to-wit:

276 In the Superior Court in and for Pottawatomie County, State of Oklahoma.

No. 2114.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
A. J. CARNEY, Defendants.

Order Extending Time Within Which to Make and Serve Case-Made.

Now, on this 8th day of June, A. D. 1915, the same being one of the regular judicial days of the April, 1915 term of the above entitled Court, and the above cause coming on for hearing upon the application of defendant for additional time within which to make and serve case-made, and it appearing to the Court that there has not been sufficient time allowed within which to make and serve case-made because of the failure to find certain court papers, namely, the Instructions of the Court to the Jury, it is,

Therefore, by the Court considered, ordered, adjudged and decreed that the defendant may have an additional thirty (30) days within which to make and serve case-made in the said cause, and that

the plaintiff be allowed ten (10) days after date of service of the same within which to suggest amendments thereto, and the case-made to be signed and settled upon five (5) days' notice, subsequent to the service, or expiration of the time within which to suggest amendments, said notice to be given by either party thereto.

LEANDER G. PITMAN,
Judge.

Endorsed: No. 2114. In Superior Court. Fred Ward vs. Chicago, Rock Island & Pacific Ry. Co. Order extending time. Filed in Superior Court June 8, 1915. R. L. Flynn, Court Clerk. By Harry Watts, Deputy.

277 That thereafter on the 7th day of July, 1915, and before the expiration of the time heretofore given upon the application of the defendants for additional time in which to prepare and serve case-made and making of suggestions of amendments thereto and settling the same and upon said application the Court made an order extending said times, which order is in words and figures as follow, to-wit:

278 STATE OF OKLAHOMA,
Pottawatomie County, ss:

In the Superior Court in and for Said County and State.

No. 2114.

FRED WARD, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY et al.,
Defendant.

Order.

Now on this 7th day of July, 1915, upon good cause shown, the time heretofore given to the defendants in which to prepare and serve case-made for the appeal of the above entitled cause to the Supreme Court of the State of Oklahoma, is extended thirty (30) days from the expiration of the time heretofore given; plaintiff is given ten days after service of said case-made in which to make suggestions of amendments; the same to be settled and signed upon five days' notice by either party; and it is further ordered by the court that the time heretofore given in which defendants may file its petition in error in the Supreme Court is hereby extended twenty days from the expiration of the time heretofore given for such purpose.

LEANDER G. PITMAN,
Judge of the Superior Court.

Endorsed: 2114—Order—Filed in Superior Court Jul- 7, 1915
Pottawatomie County, Okla. R. L. Flynn, Court Clerk, By Harry
Watts, Deputy. Rec. 7-17-'15.

279 In the Superior Court, in and for Pottawatomie County,
State of Oklahoma.

No. 2114.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
A. J. CARNEY, Defendants.

To the above named plaintiff and his attorneys of record, W. S. Pendleton and T. G. Cutlip:

You, and each of you will take notice that the above and foregoing case-made in the above entitled cause is tendered to you and each of you as a full, true, complete and correct case-made in said cause, this 2nd day of August, A. D., 1915.

C. O. BLAKE,
R. P. ROBERTS,
EDWARD HOWELL,
Attorneys for Defendants.

We hereby acknowledge due, legal and timely service of the above and foregoing case-made upon us this 2nd day of August, 1915.

W. S. PENDLETON,
T. G. CUTLIP,
Attorneys for Plaintiff.

280 In the Superior Court, in and for Pottawatomie County,
State of Oklahoma.

No. 2114.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
A. J. CARNEY, Defendants.

Waiver of Suggestion of Amendments.

We, the undersigned, plaintiff and attorneys for the plaintiff in the above entitled cause, hereby waive the suggestion of any amendments to the above and foregoing case-made, and accept the same as a true, full, complete and correct case-made of said cause.

_____, Plaintiff.
_____,
_____,
Attorneys for Plaintiff.

281 In the Superior Court, in and for Pottawatomie County,
State of Oklahoma.

No. 2114.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
A. J. CARNEY, Defendants.

We hereby waive the service of notice of time and place on the
signing and settling of the above and foregoing case-made.

Aug. 12, 1915.

FRED WARD, *Plaintiff.*

T. G. CUTLIP,

W. S. PENDLETON,

Attorneys for Plaintiff.

282 In the Superior Court of Pottawatomie County, State of
Oklahoma.

No. 2114.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
A. J. CARNEY, Defendants.

I, the undersigned, judge of the above entitled Court at the time
of the trial of the above entitled cause, as said judge who tried said
cause, hereby certify that the above and foregoing case-made was
presented to me as a true, full, complete and correct case-made in
said cause, and the plaintiff appeared by his attorney W. S. Pendle-
ton and defendants by their attorney Edward Howell and the sug-
gestions of amendments to said case made having now been waived
by counsel for the plaintiff and notice of the time and place of pres-
entation of the same to me for signing and settling having also been
waived by the plaintiff;

Now, therefore, I, as said judge of said above entitled Court, who
tried said cause, hereby settle and sign the above and foregoing case-
made as a true, full, complete and correct case-made in said cause,
and direct that it be attested as such by the clerk of the above Court
and filed by him therein, to be thereafter withdrawn and delivered
to the defendant herein for filing in the Supreme Court of the State
of Oklahoma.

Witness my hand at Shawnee, in Pottawatomie County, Oklahoma, this 13th day of August, A. D., 1915.

[SEAL.]

LEANDER G. PITMAN, Judge.

Attest:

R. L. FLYNN,
Court Clerk.
HARRY WATTS,
Deputy.

Filed in Superior Court Aug. 13, 1915, Pottawatomie County, Okla., R. L. Flynn, Court Clerk, By Harry Watts, Deputy.

Filed in Superior Court and withdrawn for filing in the Supreme Court of the State of Oklahoma, both on the 13th day of August, 1915.

R. L. FLYNN, *Clerk,*
By HARRY WATTS, *Deputy.* [SEAL.]

283 In the Superior Court in and for Pottawatomie County, State of Oklahoma.

No. 2114.

FRED WARD, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
A. J. CARNEY, Defendants.

We hereby waive the issuance and service of summons in error out of the Supreme Court of the State of Oklahoma in the above entitled cause, and hereby voluntarily enter our appearance in said Court in said cause.

FRED WARD,
Plaintiff.
T. G. CUTLIP &
W. S. PENDLETON,
Attorneys for Plaintiff.

Filed Sept. 8, 1915, William M. Franklin, Clerk.

284 Thereafter, at the April, 1916, Term of said Supreme Court, on the 26th day of April, 1916, the following proceeding was had in said cause, to wit:

And now on this day the following listed and numbered and entitled causes are submitted on the records and briefs filed therein:

* * * * *

#7646.

C. R. I. & P. R. Co. et al.

vs.

FRED WARD.

* * * * *

285 Thereafter, at the October, 1916, Term of said Supreme Court, on the 31st day of October, 1916, the following proceeding was had in said cause, to wit:

#7646.

C. R. I. & P. R. Co.

vs.

FRED WARD.

And now on this day the above cause comes on for final decision and determination by the court upon the record and briefs filed herein,

And the court having considered the same finds that the above cause should be reversed and remanded. Opinion by Edwards, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

286 In the Supreme Court of the State of Oklahoma. Supreme Court Commission, Division Number Four.

No. 7646.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY and A. J. CARNEY, Plaintiffs in Error,

vs.

FRED WARD, Defendant in Error.

Filed Oct. 31, 1916, William M. Franklin, Clerk.

Oct. 31, 1916. By the Court: Adopted in whole.

Syllabus.

1. A case, which by the proof is brought within the Federal Employers' Liability Act (35 U. S. Stat. at Large, 65 Chap., 149 U. S.

Comp. Stat. Supp. 1911, p. 1322), is controlled exclusively by such act, although its provisions may not have been directly pleaded.

2. Where, upon the trial of an action for personal injury, brought under the state law, the evidence shows that at the time of the injury complained of, the plaintiff was engaged with the defendant in interstate commerce, and at the conclusion of the evidence the defendant requests the court to instruct the jury that the Federal Employers' Liability Act applies; held, that such request is timely and sufficient to invoke the provisions of the Federal Act.

3. Under the common law an employee engaged as a switchman assumes all the ordinary and usual risks and perils incident to his employment, and also assumes all risks which he knew or in the exercise of reasonable care should have known to exist, including risks due to defective conditions and defective methods.

4. Evidence examined, and held; that the injury complained of sustained by plaintiff was due to risks assumed by him as a matter of law.

Error from Superior Court Pottawatomie County.

Leander G. Pittman, Judge.

Action by Fred Ward against Chicago, Rock Island and Pacific Railway Company and A. J. Garney. Judgment for plaintiff and defendants appeal. Reversed.

287 R. J. Roberts, C. O. Blake, W. H. Moore, K. W. Sharrel, Abernathy & Howell, for Plaintiffs in Error.

T. G. Cutlip, W. S. Pendleton and R. A. Rogers, for Defendant in Error.

Opinion of the Court, by

EDWARDS, C.:

For convenience the parties will be referred to as plaintiff and defendants, according to their position in the lower court.

The plaintiff in his petition alleges in substance that the defendant railway company is a railroad corporation and owned, maintained and operated extensive railway shops and switching grounds at Shawnee, Oklahoma; that the defendant Carney was an engine foreman, resided in Pottawatomie County and in the employ of defendant railway company, that on December 10th, 1913, plaintiff was a switchman in the switch yard of defendant railway company, at Shawnee. That on said date a train of cars upon the line of defendant railway company was drawn into the city of Shawnee and under the directions of the defendant Carney about twenty cars were cut off from said train and drawn near to switch No. 10; that the grade of the switch was such that the cars after being shoved upon said switch and cut loose from the engine, would, by gravity,

run down the grade of said switch until stopped by the switchman. That plaintiff was the only switchman in charge of said train and was on the top of the car farthest from the engine, said car thus being in front as the string of cars were shoved upon said switch. That it was the duty of the defendant Carney after the cars were passed upon said switch to cause same to be uncoupled that they might run down said switch under the control of plaintiff and it was the duty of plaintiff to manipulate the brakes, keep the cars under control and stop them at the proper place. That after the cars were shoved upon said switch the engine ceased to exhaust and knowing it was the duty of said Carney to cause said cars to be uncoupled, plaintiff in the line of his duty went to the brake upon said front car to apply the brake in order to control said cars and while stooped over to take hold of the brake the said Carney 288 caused the engineer to turn the throttle whereby the engine ceased to exhaust and to apply the air brakes to the engine, without said cars having been uncoupled therefrom and thereby the speed of the engine was retarded and the engine moved more slowly than said cars and said cars as a result began to check speed violently one at a time and said checking impulse reached the front car just as plaintiff stooped over, and the motion of said front car was checked so violently and suddenly that plaintiff was thrown from said car to the ground and sustained injury, and that the injury sustained was due to the negligence of the said defendant Carney in not promptly having said cars uncoupled; damages are prayed in the sum of \$10,000.00.

Each of the defendants filed a general demurrer to the petition, which demurrers were overruled and separate answers filed. The answer of defendant railway company is, first, a general denial, with an admission of incorporation, as alleged; second, denial of negligence of defendants and the allegation that the injury, if any, was due to the negligence of plaintiff; third, the plea of assumption of risk; fourth, the plea of contributory negligence.

The answer of defendant Carney is a general denial.

The case was tried to a jury and a verdict returned in favor of plaintiff and against the defendants jointly in the sum of \$3,000.00. Motions for new trial were filed by each of said defendants, which motions were overruled, and, in due time, the cause appealed to this court.

Several errors are assigned and urged in the argument of counsel, all the propositions being based upon the contention that the Federal Employers' Liability Act is controlling in this case. Therefore, it is first necessary to determine whether or not the Federal Act is invoked and is applicable under the record.

The petition upon which the cause was tried makes no reference to the Federal Employers' Liability Act. The act is not pleaded in the answer of either defendant. It is nowhere alleged that the plaintiff at the time of his injury was engaged in interstate commerce. In the evidence, however, the following proof was made:

289 "Q. Do you remember the number of the car you were on, Mr. Ward, at the time you fell off?

A. Yes, sir.

Q. What was it?

A. C-56643.

Q. Mr. Carney, you say you checked this list; you say you checked these cars—do you remember the number of the car, the last car in the cut on which Mr. Ward was riding?

A. 56643, Rock Island.

Q. Where was that car going to?

A. It was going to New Orleans, by way of Alexandria, La.

Q. Where was it from?

A. Wichita, Kans."

This is the only manner in which it is suggested, either in the pleadings or evidence, that the plaintiff's cause of action is within the provision of the Federal Employers' Liability Act. At the conclusion of the evidence the defendant Railway Company, first moved for a verdict in its favor, assigning the reason that under the Federal Employers' Liability Act the evidence was insufficient to warrant a judgment for plaintiff, which was overruled and defendant then requested an instruction, as follows:

"You are instructed that the evidence in this case shows that plaintiff's accident occurred while switching car C. R. I. & P. Ry. Co. No. 56643 from train No. 92 coming into Shawnee to another train No. 92 going out of Shawnee and that said car was shipped from Wichita, Kansas to Alexandria, Louisiana.

You are therefore instructed that the rights of the parties in this case are determined by the Federal Employers' Liability Act of 1908 as defined in these instructions."

which request was refused and exceptions allowed.

The defendant railway company contends that the evidence and not the allegations of the pleadings govern. That it is not necessary to make any specific reference to the Federal Act itself, but that such act attaches as soon as the proof establishes that the plaintiff at the time of his injury was engaged with the defendant in interstate commerce; that the Federal Act controls the rights of the parties, both as to the obligation of the servant and the duty of the master.

The plaintiff, on the contrary, contends that the action is one under the State Laws and was so treated by the parties and that the issue as made did not invoke the provisions of the Federal Act. It is ad-

mitted, however, that the pleadings need not specifically refer 290 to the Federal Act, if the facts alleged are sufficient to bring the cause of action within its terms, but plaintiff further contends that the facts alleged in this case are not sufficient to bring the cause under the Federal Act but on the contrary the petition is framed, states a cause of action and the evidence establishes his right to recover under the State law, and in such case the defendant, to defeat a recovery under the State law must plead and prove that the cause of action arose under the Federal Act. In this state of the

record the case seems to be near the border line and it is difficult to determine whether or not the Federal Employers' Liability Act is invoked and is controlling.

That the plaintiff, at the time of his injury was engaged in interstate commerce is, we think, self evident, and that he was so engaged is not controverted by the plaintiff. It is settled law that for any injury incurred in interstate commerce the Federal Act is exclusive in its operation, and controlling. (Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. Ed. 1226; Grand Trunk & W. Ry. Co. v. Lindsay, 233 U. S. 42, 58 L. Ed. 838; 2 Employers' Liability Cases, 233 U. S. 1, 56 L. Ed. 327; St. L. & S. F. Ry. Co. v. Bilby, 35 Okla. 589, 130 Pac. 1089.)

The only manner in which the provisions of the Federal Act are suggested is by the evidence quoted and the request of the defendant at the conclusion of the evidence, for the instruction above set out, but this, we think, was sufficient and timely.

The Supreme Court of the United States, in the case of St. L. S. F. & Texas Ry Co. v. Seale, (U. S.) 57 L. Ed. 1129, holds, Mr. Justice Vandeveenter speaking for the court,

"The real question, therefore, is, whether the Federal statute was applicable; and this turns upon whether the injuries which caused the death of the deceased were sustained while the company was engaged, and while he was employed by it, in interstate commerce. Second Employers' Liability Cases, *supra*: Pedersen v. Delaware, L. & W. R. Co. (Decision announced with this.) (229 U. S. 146, ante, 1125, 33 Sup. Ct. Rep. 648.)

The plaintiff's petition was altogether silent upon that subject and the defendant, by appropriate special exceptions, called attention to the two statutes, insisted that whether one or the other applied depended upon facts not stated, and asked that the plaintiff be required so to state the facts as to enable it to perceive which statute was relied upon. The exceptions were overruled. * * * At the conclusion of the evidence the defendant requested the court to direct a verdict in its

favor on the ground that the undisputed evidence disclosed
291 that the case was one in which the defendant's liability was controlled by the Federal Statute, and that, if liable, it was liable only to the personal representative of the deceased. And not to plaintiffs. The request was denied and the jury returned a verdict for the plaintiff, in which the damages were apportioned among them conformably to the state law. * * * It comes, then, to this: The plaintiff's petition, as ruled by the State Court, stated a case under the State Statute. The defendant, by its special exceptions, called attention to the Federal Statute, and suggested that the State Statute might not be the applicable one. But the plaintiffs, with the sanction of the court, stood by their petition. * * * When the evidence was adduced it developed that the real cause was not controlled by the State Statute but by the Federal Statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal Statute, that the plaintiffs were not entitled to recover on the case

proved. We think the objection was interposed in due time and that the State Courts erred in overruling it."

The situation developed in the Seale case, *supra*, was very similar to the situation here and while the requested instruction above quoted is no more than a declaration of the applicability of the Federal Act, yet it is a suggestion and request to the court to apply the provisions of that act instead of the state laws and for that purpose was sufficient to direct the attention of the court to the Federal Act and to call for the application of its provisions, but as the requested instruction itself states no principle for the guidance of the jury there was no error in refusing to give it.

Having determined that the Federal Act applies in this case and that it was properly called to the attention of the court, then this court must determine if any error requiring a reversal was committed by the trial court. The plaintiff in error urges two assignments of error as a ground for reversal.

First. That a motion for an instructed verdict should have been sustained, because the plaintiff assumed the risk as a matter of law.

Second. That the court gave erroneous instructions to the jury.

In considering the first assignment of error it appears from the uncontested evidence that the plaintiff had been in railroad service for a number of years, beginning when a youth in grading work; that he had worked as brakeman, later was promoted to the position of conductor, later he worked some four or five years as switchman with the Iron Mountain Railroad and had been employed with the

Rock Island as switchman, for some two months at the time 292 of his injury. He was a man of mature years and experience

and was familiar with the condition of the yards in which he was employed and the methods pursued in switching and handling the cars, and as a matter of fact and of law knew and appreciated fully all the risks and hazards of the work in which he was engaged. The circumstances of the injury are about as follows: Train No. 92 was being broken up and the switch engine with which plaintiff was connected coupled onto the forward cars of this train and switched them onto a diagonal track and there some 22 cars were coupled onto by the switch engine. As this cut of cars moved Eastward, the plaintiff, Ward, and the switch foreman, Carney, climbed on the top of the rear of the cut of cars and rode eastward until about the place where the cut stopped, which was just east of the switch leading to and connecting with the track upon which the cut of cars was to be placed. There was a slight crest or hump at about this point in the yard, the yard sloping downward both toward the east and west and it was necessary, therefore, for the engine to push the cars westward over this crest after which they would of their own motion roll slowly in a westward direction. After an exchange of signals the cars began to move westward and when the cars had travelled about three car lengths the engine ceased to exhaust and slowed the cars down, and when they approached the crest they were going at a speed of from five to six miles an hour. At the time the cars entered the switch the foreman Carney called to Ward a warning as to the size of the cut.

Upon the engine ceasing to exhaust the plaintiff Ward, without any signal, believing that the cut of cars to go upon this sidetrack had been uncoupled from the others, stepped to the end of the car upon which he was riding to apply the brake, when as a matter of fact the cars had not been uncoupled, but the engine had been slowed down in order to check the momentum of the cars before they were uncoupled so that they could be handled more easily by the brakeman. This slowing of the engine imparted a checking process to the cars which reached the car upon which the plaintiff was riding, just at the time he was bending over and taking hold of the brake, thereby causing him to fall to the ground. There is no evidence that there

293 was anything unusual about the manner in which this cut of cars was handled. The only negligence that can be attributed to the railroad company is that the engineer slowed down the cars before the cut of cars upon which the plaintiff was riding was uncoupled from the others. This was done as a matter of precaution

and to enable the plaintiff to more safely handle the cars when uncoupled. The plaintiff simply misinterpreted the absence of the exhaust of the engine, and from that circumstance drew the inference that the cars had been uncoupled, instead of the correct inference that the ceasing to exhaust was for the purpose of slowing the cars before uncoupling. The plaintiff was engaged in a hazardous employment and under the common law assumed all the ordinary and usual risks and perils incident to such employment, whether dangerous or otherwise, and also assumed all risks which he knew or in the exercise of reasonable care should have known to exist, including the risks due to defective conditions or defective methods: Central Vermont Ry. Co. v. Bethune, 206 Fed., 868; Boldt v. Penn. R. Co. 218 Fed. 367; Ft. Worth & Denver Ry. Co. v. Copeland, 164 S. W. 857; Charleston & W. C. Ry. Co. v. Sylvester, 86 S. E. 275.

If this act of slowing the engine to check the momentum of the cars was negligence on the part of the railroad company, then it may be said that the injury sustained by plaintiff was due to the negligent operation of the switch engine; but even then, it would be only negligence in failing to provide a safe method. But the use of this method was known to the plaintiff and the risks and hazards incident thereto were so obvious that as a man of ordinary intelligence he must, as a matter of law, have realized and assumed them as a part of the risks and hazards of his employment. We believe that the motion of the defendant for an instructed verdict should have been sustained. Having reached this conclusion it will not be necessary to consider the other assignments of error.

The cause is reversed and remanded.

294 Thereafter, on the 11th day of November, 1916, the following proceeding was had in said cause, to wit:

#7646.

C. R. I. & P. R. Co.

vs.

WARD.

And now on this Nov. 11, 1916, it is ordered by the court that defendant in error be given 15 days additional time in which to file petition for rehearing in the above cause, after the expiration of the 15 days allowed by the rules.

295 In the Supreme Court of the State of Oklahoma.

No. 7646.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
A. J. CARNEY, Plaintiffs in Error,

vs.

FRED WARD, Defendant in Error.

Motion for the Supreme Court to Hear This Cause or Motion for Rehearing.

Comes now Fred Ward, the Defendant in Error in the above entitled cause, and recites to the Court that heretofore in the Court below he obtained a judgment against the Plaintiff in Error, Defendant below, for the sum of Three Thousand (\$3,000) Dollars, and that the Plaintiff in Error, Defendant below, brought this cause by Petition in Error to this Court. The same was referred to Commission No. 4, which Court, after hearing, reversed the judgment of the Court below. The Defendant in Error promptly filed motion for rehearing, which motion was extended and the same is now filed on the following grounds:

1st. Because the Court erred in holding that the motion by Plaintiff in Error in the trial Court for an instructed verdict should have been sustained.

2nd. Because the Court erred in holding that Plaintiff below, Defendant in Error, assumed the risk of injuries on the occasion in question as a matter of law.

3rd. Because the Court erred in holding that the trial Court gave erroneous instructions to the jury.

4th. Because, if any of the instructions of the Court below to the jury were erroneous, the error was harmless, and not 296 of sufficient importance to justify the reversal of the judgment.

And we urge the Supreme Court itself to hear this motion for rehearing on the ground, among others, (1) that there is involved the question as to whether this cause should be rightfully tried under

the act of Congress rather than under the laws of this state, and (2) that the question of assumption of risk is seriously involved thereunder. We maintain that it is a question of fact depending upon the negligence of the defendant Carney. And one of first impression in this State.

And for further grounds, we would now refer the Court to our Brief and Argument on Motion for Rehearing, hereto attached as Exhibit "A" to this Motion.

All of which is respectfully submitted.

Counsel for Defendant in Error.

297 In the Supreme Court, State of Oklahoma.

No. 7646.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
A. J. CARNEY, Plaintiffs in Error,

vs.

FRED WARD, Defendant in Error.

Brief and Argument on Motion for Rehearing.

The word plaintiff hereinafter used is understood to refer to defendant in error, and the word defendant to the plaintiff in error.

For the purpose of this argument we will be content with what has been already said both in the defendant in error's brief on the question as to whether the plaintiff in error, the defendant below, raised at proper time the issue as to whether this case should be tried under Act of Congress rather than the law of the state.

But we most respectfully urge that granting the view taken by the Court on that issue is correct, nevertheless, the facts in this case did not bring the case within the Act of Congress, but shows that the question of assumption of risk was a matter of fact and not a matter of law; therefore, was a proper question to be submitted to the jury.

We further submit that the Court seems to have overlooked the fact that the question of negligence of the defendant Carney as a servant of the co-defendant, the Railway Company, was raised by plaintiff and earnestly insisted upon; in fact, that the plaintiff's case, both as made by the petition and by his evidence was based upon the alleged negligence of the defendant Carney. We insist that the negligent manner in which the defendant Carney managed the uncoupling of the cars, under the allegations and the proof, made an issue of fact which was proper to be submitted to the jury. In support of this proposition, we refer to the following cases, most

298 of which were cited in defendant in error's brief on pages 6, 7, 8 and 9, Sanders vs. Railway Company, 81 S. E. 283; Railway Co. vs. Wilson, 171 S. W. 430; Pankey vs. Railway Co., 180 Mo. App. 185; Railway Co. vs. Lindsay 233 U. S. 242; Rail-

way Co. vs. Goughnour 208 Fed. 961; Railway Co. vs. Reed, 211 Fed. 111; Railway Co. vs. Davide 210 Fed. 870; Ridge vs. Norfolk Railway Co. 83 S. E. 762; Hardwick vs. Railway Co., 181 Mo. App. 156; Railway vs. Bunkley, 153 S. W. 937; Louisville & N. R. Co. vs. Lankford, 209 Fed. 321; Chesapeake and O. R. Co. vs. Proffit, 218 Fed., 23; Niles vs. Cent. V. Railway Co. 87 Vt. 356; Colasurda vs. Cent. Railway Co. 180 Fed., 832; Vickery vs. New London N. Railway Co. 87 Conn. 634; M. K. & T. Ry. Co., vs. Freeman 168 S. W. 69. It appears that this Court has misapprehended the grounds of negligence insisted upon by defendant in error. We quote here from the Court's decision.

"If this act of slowing the engine to check the momentum of the cars was negligence on the part of the Railroad Company, then it may be said that the injury sustained by plaintiff was due to the negligent operation of the switch engine; but even then, it would be only negligence in failing to provide a safe method. But the use of this method was known to the plaintiff and the risks and hazards incident thereto were so obvious that as a man of ordinary intelligence he must, as a matter of law, have realized and assumed them as a part of the risks and hazards of his employment."

This does not express the theory of the plaintiff's case at all. Plaintiff has not contended that there was negligence in slowing up the train after having started it and having pushed it far enough so that the cars to be switched could pass over the highest point on the track by the force of gravity. There is nothing in the petition, nor in the evidence, nor in the brief of plaintiff to indicate that he charged this to be an act of negligence. Common sense would teach that this slowing process was necessary and is necessary in every case where the object has been accomplished, and where it is no longer necessary to push back the train of cars. If the engineer had 299 not slowed up the train, the whole train of cars, engine and all would have gone over the track along with the cut of cars under the management of plaintiff.

What the plaintiff complains of is the failure of defendant Carney to uncouple the cars at the exact and critical moment, when the cut of cars consigned to the defendant could have been separated from the balance of the train without the severe and violent shock, which caused the plaintiff's fall and injury.

On a careful and intelligent study of the case, of the position of the cars, and the circumstances, it is reasonably clear that the sudden and violent shock was the immediate cause of the plaintiff's injury. Now there is no proof, and nothing in the case which would indicate that this sudden and violent shock was one of the ordinary risks of that business, which the plaintiff might have expected to occur at any time and against which he could be presumed as a matter of law to be on his guard. It is our recollection of the evidence that there was no proof offered to show that such a shock was a usual or common thing, or even that a similar thing had ever happened before. If it was not a common or usual incident of the business of switching in which the plaintiff was engaged he could not have been held to have assumed the risk of injury from such an incident. The

plaintiff himself testified that in all his experience as a switchman over a period of several years in different places and on different roads such a thing never happened to him before. But the defendants claim, not that this was one of the usual incidents of the business, that is the failure of defendant Carney to uncouple the cars at the proper moment, but that it was done by the defendant Carney in good faith, as a matter of precaution to aid the plaintiff in better handling his cut of cars by retarding the speed of the same.

Now upon that theory the question of negligence and the question of assumed risk are questions of fact proper to be submitted 300 to the jury and it might not be said that plaintiff assumed the risks as a matter of law. Now one of two views is necessary and reasonable in this case, either that Carney was guilty of negligence in case he failed to uncouple the cars before the shock, provided, the cars were then running at a usual and ordinary rate of speed in such cases, or if the cars were running at such an unusual rate of speed then it became necessary for Carney in the emergency to take the responsibility of delaying the uncoupling of the cars, and of transmitting the shock to plaintiff's end, in order, as he believed, to save the plaintiff from injury on account of the great speed. But in either case, there would be a question of negligence as a matter of fact for the jury.

Even if the cars had been running at a high rate of speed such as to impress the defendant Carney, that unless checked in some way, the cut of cars under plaintiff's charge when turned loose might get beyond plaintiff's control, and granting that he believed it was his duty under the circumstances to delay the uncoupling of the cars for the purpose of retarding the speed, yet that could not relieve the Company from the responsibility of having permitted the train of cars to be run under the circumstances at such a rate of speed; and Carney himself or the Company would not be relieved from the charge of negligence. If, when placed in such a predicament, he, Carney, attempted to choose between the two courses, and unfortunately chose the wrong one, such mistake was not chargeable to the plaintiff, but was necessarily chargeable to the defendants.

But the question as to the rate of speed at which the cars were moving is itself a difficult one, defendants through their witnesses claiming that the cars were moving at a rather high speed, while the plaintiff says, there was nothing unusual in the speed of the cars. We quote an abstract of the plaintiff's testimony, from defendant's brief,

page 22:

301 "Speed of the cars was about four to five miles an hour; witness had seen cars move 18 to 20 miles an hour in the yard, this movement was not nearly so rapid as plaintiff had seen."

Again, we quote further:

"Plaintiff lit about three feet in front and near end of the car; cars then going from two to five miles an hour, witness rolled over between the rails faster than the cars was moving towards him; rolled over the main north rail out of the way of the approaching cars; cars did not touch plaintiff's body as they passed."

Showing that at least after the sudden checking of the cars and

after plaintiff's fall the cars were not running so rapidly, but that plaintiff could turn his body over and over and get out of the way. So it appears that even the question of the rate of speed, was one of the facts to be submitted to the jury and not a question of law. And if the jury should find in favor of plaintiff's contention, the fact of negligence would be clearly established against the defendant Carney, for delaying the uncoupling of the cars, when in fact there was no reason to do so, but the plaintiff claims and has claimed all through the case, that this theory of the case set up by the witness Carney, that he delayed the uncoupling of the cars because they were going so rapidly that he thought it was for the plaintiff's benefit, that the speed be checked, was all a subterfuge, a mere after thought, raised for the purpose of shifting the blame from himself. This also raised a question of fact proper to be submitted to the jury. And the plaintiff's view of this phase of the case may with propriety be further discussed here. The evidence discloses the fact that almost immediately after plaintiff's injury occurred the defendant Carney was for some cause dismissed from the service of the defendant Company. That he was afterwards, and within a few weeks prior to the first trial of the case in the Superior Court, re-instated by the Company and was in the Company's service at the time of the trial, indeed, of both trials of this case in the Courts below.

302 It will be remembered, that in the cross-examination of the witness Carney, as shown in defendant's brief, page 34, the witness denies that he had been discharged for this offense and denied having had a certain conversation with Judge Reasor on that subject. We quote here from Carney's testimony.

"Was not subsequently discharged because of participation in this accident; and did not state that he was discharged for this offense either to Judge Reasor or Judge Pendleton;—threw switch so that the twelve cars remaining in the cut after the eleven had been uncoupled and gone down on main line at which time the cars were running about two to three miles an hour; had had no conversation with Judge Reasor nor in Judge Reasor's office; went with Earl Ward to Reasor's office at Earl Ward's request in connection with Earl Ward's garnishment; witness Carney was present at previous trial of case, had been re-instated some six or seven months prior to the date of the trial (meaning the last trial); out of Shawnee some three months had been working probably sixty days before first trial."

Following this, we quote from the testimony of Earl Ward, shown on page 44 of the defendant's brief.

"That he knew A. J. Carney, defendant; went on one occasion with defendant, A. J. Carney, to Judge Reasor's office in Shawnee, before the first trial of this case; he, Carney, said in substance that he lost his job on account of Fred Ward's case and could not get it back unless he would swear to a lie." We also quote from the testimony of Judge Reasor, E. D. Reasor, as follows: as shown on page 46 of the Defendant's brief, "That he had a conversation with Earl Ward, with Earl Ward and Carney in his office in the Spring or Summer of 1914, Carney stated in substance that he was out of a job and that in his conversation with the superintendent, (meaning the superin-

tendent of the defendant Company) he told him that he could not get back unless he would straighten up the Ward case and he asked the superintendent if he expected him to perjure himself, and the superintendent said, 'it is up to you.' "

So it appears that there is a serious question as to the credibility of the witnesses and especially of the witness Carney. It is plain that if the plaintiff's theory of the case, that is, that Carney's negligence was the proximate cause of his injury, the whole question is a question of fact, and there is no room for the consideration of the question of assumed risk as a matter of law. And being a matter of fact instead of a matter of law, the verdict of the jury should be sustained. Indeed, from the plaintiff's standpoint and on his theory of the case, there is no evidence whatever of assumption of risk

303 on the part of plaintiff in this case, it could have only arisen on the analysis of the case made by the Court, that is, that the plaintiff bases his action on the ground of negligence in the defendant Company's servants in slowing up the train, all of which we have shown to be a misapprehension. And the case so far as the assumption of risk is concerned, seems to come within the following language quoted from case of railway Company vs. Nelson, 212 Federal 69, to-wit:

"That there was no substantial evidence to sustain a verdict, that the plaintiff assumed the risk of his injury, or that he was guilty of contributory negligence, this record satisfied beyond a doubt that the alleged errors and rulings of the Court on these subjects, as well as matters relating to the question whether the cause of action arose under the Federal Law or under the State Laws, and did not prejudice, and could not have prejudiced, the defendant, and they are accordingly dismissed without further discussion, whether they were made upon questions regarding the pleadings, upon the admission or exclusion of evidence, in the charge of the Court, or in its refusal of requested instructions."

In addition to the foregoing, we cannot do better than refer the Court here to the reasoning and authorities set forth in plaintiff's brief on page 10, on the question of assumed risk.

As the case now before the Court is one of rare occurrence, we will endeavor to describe to the Court the situation just as it was on the night of the injury. The defendant's main track running through the yards in Shawnee lies almost East and West, at a certain point on the main track near where the switch leads off to the Southwest, is the highest place on the said track, a grade sloping therefrom both to the East and to the West. On the occasion in question about twenty-two or more cars were hauled by defendant's switch-engine from a point west of defendant's yards over said high place or hump to the East side thereof, the last car had passed over the hump, the switch-foreman, Carney, turned the switch so that the cars could be backed on switch #10 in a southwesterly direction.

Down that switch a cut of cars when separated from the train would run by the force of gravity. After the switch was turned, 304 the switch-foreman gives the signal to the engineer to back up the train. This was done and we can readily see that in

so backing the train the impulse comes first from the engine pressing against the nearest car making what is called a slack, then that first car and the engine jointly press against the second car, and the motion continues until the last car is reached before the entire train starts west. Then as the first car in the rear of the train passes over the hump and on to the switch, having already acquired the speed communicated to it by the engine in backing the train, it had its speed increased immediately by the force of gravity, and the first effect is to take out the slack between the first and second cars. This being accomplished or caused altogether by the force of gravity would not create any shock or violent noise, but would be barely perceptible. And so as the second car passed over by the same process and by the operation of the same force, the slack is taken out between it and the third car and so on from one car to the other alike, the slack is taken up until all the cars cut off from the train, if properly cut off would pass without any shock or violence on to the switch and all under the control of the switchman, that is, of the plaintiff in this case. But in the meantime, while the cars belonging to this cut on the rear end of the train are proceeding as mentioned, the switch-foreman has given his signal to the engineer to "slow up." The engineer reverses his engine, giving it a slower motion than the balance of the train, and thus takes out the slack between the engine and the first car, between the first and the second, and the second and the third cars, respectively, until the two opposing forces, that is, the slowing process on the east side of the hump and the movement at the other end, by its first acquired motion and the force of gravity, meet. Up to the point of meeting the movement of the cars is comparatively noiseless; but it is the duty of the switch foreman when the last car of the proposed cut is just about to straighten out the

slack between it and the next car, to uncouple the cars at 305 that instant. That is the only time when the uncoupling is done with ease and without a violent shock. Where the cars are pressed closely together, or where they are pulling apart with some force, the uncoupling is difficult. Sometimes it may be done, when the cars make what is called the second rebound. But the shock always comes on the failure to uncouple promptly on the first rebound. Now it is perfectly plain, that at the critical moment if the switch foreman properly uncoupled the car, the cut of cars under the charge of the switchman, who in this case is the plaintiff, he would receive no shock, but the last car on his cut would be separated from the train without any violence or noise. There can be no shock or violence in thus making a cut of cars if the switch foreman does his duty and uncouples properly before these opposing forces meet. In this case, the switch foreman, whatever may have been his motive, was, so far as the plaintiff was concerned, guilty of negligence in failing to uncouple the cars in time to prevent this violent shock. And we claim that the theory of the switch-foreman, the defendant Carney, is without foundation, that is that the cars were going so rapidly that he thought it was for the plaintiff's benefit to delay the uncoupling for the purpose of retarding the speed of the cars in plaintiff's charge, because the more rapidly the cars are going, the more

violent must the shock be and the greater danger therefrom to the plaintiff.

In any possible view of the case, the defendant Carney was guilty of negligence in failing to uncouple the cars at the right moment. The plaintiff had the right to expect that this would be done and being so situated at the time that he could not see any signal, was compelled to act upon the infallible sign, the ceasing of the engine to exhaust, which, as he testifies, always occurs when the engine is reversed. In such case, plaintiff could not be charged with negligence nor could he be said to have assumed the risk.

306 As the Court discussed only one view of the case, that is, the question of assumed risk, we will not proceed further with argument on other points, but respectfully refer the Court to the Plaintiff's printed brief.

Respectfully submitted,

W. S. PENDLETON,
R. A. ROGERS, &
T. G. CUTLIP,

Counsel for Fred Ward, Deft in Error.

[Endorsed:] #7646. C. R. —. & P. Ry. Co. et al., P'ff in Error, vs. Fred Ward, Deft in Error. Motion for Supreme Court to hear Motion for Rehearing. Filed in Supreme Court of Oklahoma. Nov. 29, 1916. William M. Franklin, Clerk. W. S. Pendleton, R. A. Rogers, & T. G. Cutlip, Counsel for Deft in Error. F.

307 Thereafter on the 29th day of November, 1916, the following proceeding was had in said cause, to wit:

#7646.

C., R. I. & P. R. Co.

vs.

FRED WARD.

And now on this Nov. 29, 1916, it is ordered by the court that the petition for rehearing filed in the above cause be transferred to the Supreme Court for consideration, and the mandate is hereby stayed pending petition for rehearing.

308 Thereafter, at the April, 1917, Term of said Supreme Court, on the 1st day of May, 1917, the following proceeding was had in said cause, to wit:

#7646.

C., R. I. & P. R. Co. et al.

vs.

FRED WARD.

And now on this day it is ordered by the court that the above cause be set for oral argument on petition for rehearing before the Supreme Court at the July, 1917, Term of court.

309 Thereafter, at the July, 1917, term of said Supreme Court, on the 21st day of July, 1917, the following proceeding was had in said cause, to wit:

#7646.

C., R. I. & P. R. Co.

vs.

FRED WARD.

And now on this day the above cause is argued orally and submitted and it is ordered by the court that defendant in error be permitted to insert additional authorities in brief now on file.

310 Thereafter, at the October, 1917, Term of said Supreme Court, on the 20th day of November, 1917, the following proceeding was had in said cause, to wit:

#7646.

C., R. I. & P. R. Co. et al.

vs.

FRED WARD.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the lower court in the above cause be, and the same is hereby affirmed.

Opinion by Owen, J.

All the Justices concur.

311 Thereafter, on the 21st day of November, 1917, the following proceeding was had in said cause, to wit:

#7646.

C., R. I. & P. R. Co. et al.

vs.

FRED WARD.

And now on this Nov. 21, 1917, it is ordered by the court that petition for rehearing in the above cause be, and the same is hereby granted, and opinion filed in said cause on Oct. 31, 1917, is hereby withdrawn.

312 In the Supreme Court of the State of Oklahoma.

No. 7646.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and A. J. CARNEY, Plaintiffs in Error,

vs.

FRED WARD, Defendant in Error.

Petition and Argument for Rehearing.

No. 278.

Dec. 4, 1917.

[Endorsed:] Received Dec. 5, 1917. William M. Franklin, Clerk.

313 Filed in Supreme Court of Oklahoma Dec. 5, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 7646.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and A. J. CARNEY, Plaintiffs in Error,

vs.

FRED WARD, Defendant in Error.

Petition and Argument for Rehearing.

(Figures in parentheses refer to pages of the case-made.)

Comes now the above named plaintiff in error and respectfully petitions the court to grant a rehearing in the above entitled cause for the reasons that questions decisive of the case and duly submitted by counsel have been overlooked by the court and for the reason that

the decision is in conflict with controlling decisions to which the attention of the court was not called, either in the brief or oral argument, and which have been overlooked by the court and for the reason that the decision of the court deprives this plaintiff in error of the rights granted to it under the Constitution of the United States and the various amendments thereto, in that this plaintiff in error is denied, within its jurisdiction, equal protection of the laws granted under the fourteenth amendment to the Constitution of the United States, and in that this plaintiff in error, by such decision, is deprived of property without due process of law, as guaranteed by the fourteenth amendment to the Constitution of the United States, and that said decision denies to this plaintiff in error a fair trial and its just and lawful defenses and their full effect to the action of the defendant in error as set forth in his petition, and involves

314 the determination of the question of the right of the plaintiff in error to be shielded from the responsibility under a Federal Statute, when properly applied, and decides, adversely to this plaintiff in error, the right, privilege and immunity claimed under the Constitution of the United States and its amendments and the Statutes of the United States, which right has been especially set up by this plaintiff in error, and that said decision violates the Constitution of the State of Oklahoma, Article 2, Section 7, thereof, in that it deprives this plaintiff in error of property without due process of law.

Argument.

The opinion of the court states the contention of the plaintiff in error that the judgment of the trial court should be reversed in the following paragraph:

"To reverse the judgment of the lower court plaintiffs in error allege two assignments: First, that the motion for an instructed verdict for defendants should have been sustained because the plaintiff assumed the risk of the injury as a matter of law. Second, erroneous instructions relating to (a) assumption of risk, (b) majority verdict, and (c) contributory negligence."

The court then proceeds to answer the first contention of the plaintiff in error; "that the motion for an instructed verdict for defendants should have been sustained because the plaintiff assumed the risk of the injury as a matter of law" by the argument:

(A) That the instructions on assumption of risk under the Federal Employers' Liability Act were not erroneous according to the statement of the doctrine of the Oklahoma Supreme Court in two cases and (B) that the record presented a question of fact which would take the case to the jury.

Under the second contention of the plaintiff in error as stated by the court above, the court restates the position taken by it in *arguendo* as to the contention of the plaintiff in error so far as it relates to the assumption of risk. On the question of (b), majority verdict, the court has been definitely decided against us by a number of cases following. *Minneapolis and St. Louis Railway Company v. ~~the court~~ (1916), 36 Sup. Ct. 595,*

241 U. S. 211, 60 L. Ed. 961; and with reference to (c), contributory negligence, we believe our contention is not good.

First, that the motion for an instructed verdict for defendants should have been sustained because the plaintiff assumed the risk of the injury as a matter of law.

The case of Chicago, Rock Island & Pacific Ry. Co. v. Hughes (Okla. 1917), 166 Pac. 411, and Missouri, O. & G. Ry. Co. v. Overmeyre (Okla. 1917), 160 Pac. 933, are quoted from and the cases Osage Coal & Mining Co. v. Sparrow (1914), 42 Okla. 726, 142 Pac. 1040, and Dewey Portland Cement Co. v. Blunt (1913), 38 Okla. 182, 132 Pac. 659, are cited. Reference is also made in the opinion to the case of Devine v. Chicago, R. I. & P. Ry. Co. (1914), 266 Ill. 248, 107 N. E. 595. It will be noted that these are all decisions of the state courts interpreting the Federal Employers' Liability Act and, of course, are not controlling. The only cases which are controlling are the decisions of the Supreme Court of the United States interpreting this act. As contended in our original brief at pages 79 to 89, it seems clear to us that the trial court instructed the jury upon the doctrine of assumption of risk as announced by the Oklahoma Supreme Court in accordance with the Constitution and Statutes of Oklahoma bearing upon this question.

In instruction No. 3 given by the court, the jury is told that if they find that the handling of the cars being switched "amounted to negligence, under the circumstances of this particular 316 case, and that as the proximate result of such negligence the plaintiff was injured, then you should return your verdict in favor of the plaintiff and against the defendants." (200.)

In instruction No. 6 given by the court to the jury, the jury is told that it was their duty to find for the plaintiff if his injury was due to the negligence of the defendant railway company or the defendant Carney, unless due to plaintiff's contributory negligence, "or that the risk was one of the necessary and natural risks incident to plaintiff's employment, as you are hereinafter instructed, in which event you should find for the defendants." (202.)

Instruction No. 7 given by the court advised the jury that the plaintiff could not recover if guilty of contributory negligence "or if you find that the risk in which he was injured, if you find that he was injured, was one of the risks incident to his employment, and that the plaintiff assumed same under his employment," (202).

Instruction No. 11 given by the court makes it very clear to our mind, that the court did not have in mind that the plaintiff would be prevented from recovering if the master was negligent. The first part of the instruction is as follows:

"You are further instructed that while a servant does not assume the extraordinary and unusual risks of the employment yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the (203) master's negligence nor such as are latent, or are only discoverable at the time of the injury. The doctrine of an assumption of risk is wholly dependent upon the servant's knowl-

edge, actual or constructive, of the dangers incident to his employment." (204.)

In instruction No. 14 given by the court, the jury is told that "the plaintiff assumed the ordinary risks of the service of switchman, so far as those risks at the time of his entering upon the employment were known to him, or were readily discernible by a person of his age and capacity in the exercise of ordinary care, whether the service of switchman was dangerous or not." (205), thus limiting the doctrine of assumption of risk to the ordinary risks of the service of switchman and excluding any defense on the grounds of the master's negligence.

We do not believe that it will be seriously contended by the court that these instructions indicate that the court was attempting to instruct under the doctrine of assumption of risk as announced by the United — Supreme Court in interpreting the Federal Employers' Liability Act. Instruction No. 3 totally omits acts of negligence which may be assumed by the employe. Instruction No. 6 considers contributory negligence as a bar and limits assumption of risk to the "necessary and natural risks." Instruction No. 7 refers only to "the risks incident to his employment," omitting any reference to negligent acts. Instruction No. 11 expressly states that the employe does not "assume such risks as are created by the master's negligence," in direct violation, as we understand it, of the doctrine as announced by the Supreme Court of the United States in cases hereinafter quoted from. Instruction No. 14 expressly limits the risks assumed to those "at the time of his entering upon the employment," which were or which should have been known to him, eliminating all possibility of negligent acts which might arise after his entrance upon his employment, but which were known to him.

318 The cases of the Supreme Court of the United States have been cited and quoted from in every case which has come before this court in which the doctrine of assumption of risk was pleaded as a defense. It may be presumed that the court is familiar with the holding of these various cases because of this fact, but because they have not followed the doctrine as announced in these cases, we see nothing else to do but to again call them to the attention of the court, asking that they will be considered by the court.

The first case announcing the principle that assumption of risk was available to the defendant in an action under the Federal Employers' Liability Act was that of *Seaboard A. L. Ry. Co. v. Horton* (1914), 233 U. S. 492, 58 L. Ed. 1062. Earlier statements of the doctrine of assumption of risk, which was said to include risks assumed by the master's negligence, are found in: *Texas & P. Ry. Co. v. Archibald* (1898), 170 U. S. 665, 42 L. Ed. 1188, the cause of action arising January 29, 1894, and; *Choctaw, O. & G. R. Co. v. McDade* (1903), 191 U. S. 65, 48 L. Ed. 96, the cause of action in this case arising August 19, 1900; *Schlemmer v. Buffalo, etc. Ry. Co.* (1906), 205 U. S. 1, 51 L. Ed. 681, 220 U. S. 590, 55 L. Ed. 596, the first decision on the case having been made by the State Supreme Court of Pennsylvania on Nov. 9, 1903 (207 Pa. 198, 56 Atl. 417).

It will be noticed that these decisions announce the doctrine of assumption of risk as it existed at common law and all involve causes of action arising prior to the enactment of the Federal Employers' Liability Act, April 22, 1908 (35 Stat. at L. 65, chap. 149; U. S. Comp. Laws, 1913, 8657).

319 The best statement of the doctrine of assumption of risk, as applied to cases arising under the Federal Employers' Liability Act, is probably made in the opinion by Mr. Justice Pitney in the case of *Seaboard Air Line Ry. Co. v. Horton*, above referred to. Its numerous phases are included in the following quotation:

Pp. 504-505. "On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions must have been recognized and applied in numerous decisions of this court. *Choctaw, Oklahoma & Gulf R. Co. v. McDade*, 191 U. S. 64, 68; *Schlemmer v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 220 U. S. 590, 596; *Tex. & Pac. Ry. Co. v. Harvey*, 228 U. S. 319, 321; *Gila Valley Ry. Co. v. Hall*, 232 U. S. 94, 102, and cases cited.

"When the employe does know of the defect, and appreciates the risk that is attributable to it, then, if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employe assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance or until the particular time specified for its performance, the employe relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise. *Hough v. Railway Co.*, 100 U. S. 213, 224; *Southwestern Brewery v. Schmidt*, 226 U. S. 162, 168. This branch of the law of master and servant seems to be traceable to *Holmes v. Clarke*, 6 Hurl. & Norm. 348; *Clarke v. Holmes*, 7 Hurl. & Norm. 937."

It is very clear to our minds that this statement of the doctrine of

assumption of risk does not exclude from it negligence on the
320 part of the master. It does not limit the risks assumed by the
employe to those which are "necessary and natural risks incident"
to the employment. It not only would permit but recognize as
a necessary part of the doctrine, risks arising by reason of the master's
negligence. It also expressly recognizes that it is not limited to
"the dangers incident to his employment". It also clearly includes
risks which may have arisen subsequent to the date upon which the
employe entered the service.

The statement of the rule as found herein in actions arising under
the Federal Employers' Liability Act has been recognized by the
United States Supreme Court in the following cases: Texas & P. Ry.
Co. v. Harvey (1913), 228 U. S. 319, 57 L. Ed. 852; Southern Ry.
Co. v. Crockett (1914), 234 U. S. 725, 58 L. Ed. 1564; Yazoo & M.
V. R. Co. v. Wright (1914), 235 U. S. 376, 379, 59 L. Ed. 277; To-
ledo, L. & W. Ry. Co. v. Slavin (1915), 236 U. S. 454, 458, 59 L.
Ed. 671; Reese, Admx. v. Philadelphia & R. Ry. Co. (1915), 239
U. S. 463, 60 L. Ed. 384.

The court is not undertaking, we believe, to decide this case under
the Oklahoma harmless error doctrine, as announced in section 6005
of the Oklahoma 1910 Code. At least, we presume that it is not.
However, we are forced to inquire why the case is affirmed if the
instructions on assumption of risk are so far out of harmony as they
seem to be with the doctrine as announced by the Supreme Court
of the United States in the above quotation. The Oklahoma harm-
less error doctrine does not control the Supreme Court of the United
States and we do not believe that it has a place in the consideration
of this appeal.

The trial court in the case of Seaboard Air Line Ry. Co. v. Hor-
ton, quoted from above, instructed the jury under the North
321 Carolina statute. The contention was made that this was not
sufficient error to justify the reversal of the cause. On this
question, Mr. Justice Pitney said:

P. 499-500: "But the theory was carried into the specific in-
structions, to the extent that upon the questions of the employer's
duty and the assumption of risk by the employe, the charge was
modeled rather upon the North Carolina statute than upon the act
of Congress * * *."

P. 501: "In these instructions the trial judge evidently adopted
the same measure of responsibility respecting the character and safe
condition of the place of work, and the appliances for the doing of
the work, that is prescribed by the local statute. But it is settled
that since Congress, by the act of 1908, took possession of the field
of the employer's liability to employes in interstate transportation
by rail, all state laws upon the subject are superseded. Second
Employers' Liability Cases, 223 U. S. 1, 55.

P. 502: "The question more particularly discussed, however, and
upon which the decision seems to have turned in the Supreme Court
of North Carolina, pertain to the issues of assumption of risk and
contributory negligence. * * *.

P. 506: "It will be observed that by this instruction the applica-

tion of the rule of assumption of risk was conditioned upon the jury finding that the water gauge, when furnished to plaintiff, was in a safe condition. Here again the court appears to have followed the local statute, rather than the act of Congress; for section 2646, Nor. Car. Revisal of 1905, already quoted, has been held by the state Supreme Court to abolish assumption of risk as a bar to an action by a railroad employe for an injury attributable to defective appliances furnished by the employer.

Pp. 507-508. "But by the common law, with respect to the assumption by the employe of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employe and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose. * * *.

"Defendant was entitled to have the requested instruction given respecting assumption of risk, and as the charge actually given did not cover the same ground there was error."

In the case of Missouri, K. & T. Ry. Co. v. Wilhoit (C. C. A. 8th C., 1908), 160 Fed. 440, Mr. Justice Van Devanter, of the 322 Supreme Court, then Circuit Judge of the Circuit Court of Appeals, had the following to say with reference to alleged erroneous instructions on the doctrine of assumption of risk:

Pp. 444-445: "At the request of the plaintiff, and over the objection and exception of the defendant, the court, without any qualification thereof, incorporated the following in its charge:

"Plaintiff had a right to rest on the assumption that the hand car in question was free from defects discoverable by proper inspection; and also: 'He had a right to assume that the defendant had used reasonable care to furnish a safe hand car, and to deal with the hand car relying on the fact that it was safe.'

"This portion of the charge was properly subject to objection, for it so stated and repeated the primary rule before mentioned as to convey the impression that it was absolute, and not subject to any exception; and this in a case where there was evidence tending persuasively to show that it fell within the exception to the rule, and where the defendant in various ways indicated that it was relying upon the exception. In other words, it left out of view, and was well calculated to cause the jury to disregard, important evidence which it was their duty to consider in forming their verdict. *Smith v. Condrv*, 1 How. 28, 35, 11 L. Ed. 35; *Rhett v. Poe*, 2 How. 457, 483, 11 L. Ed. 338; *Adams v. Roberts*, 2 How. 486, 496, 11 L. Ed. 349; *Ranney v. Barlow*, 112 U. S. 207, 215, 5 Sup. Ct. 104, 28 L. Ed. 662. And the objection was not merely that there was a failure to instruct upon a particular point, but that in view of the evidence to be considered, there was a prejudicial misdirection. *Hickory v. United States*, 151 U. S. 303, 316, 317, 14 Sup. Ct. 334, 38 L. Ed. 170; *Ranney v. Barlow*, *supra*."

We feel that it must be clear that the instructions of the trial court in this case were modeled upon the Oklahoma Law and not upon the rights arising under the Federal Employers' Liability

Act and that such instructions, in view of the case of *Seaboard Air Line Ry. Co. v. Horton* and the case of *Missouri, K. & T. Ry. Co. v. Wilhoit*, constituted reversible error.

323 (B) The record presented a question of fact which would take the case to the jury.

If the contention of the court is correct that a question of fact still exists upon the record it does not dispose of the contention of the plaintiff in error that that question of fact should be submitted to the jury under correct instructions under the Federal Employers' Liability Act. If the plaintiff in error is wrong in the contention that the plaintiff assumed the risk of the injuries received by him, as a matter of law, and the writer of the opinion is correct and the case should have gone to the jury, we do not believe that it can be successfully established that the instructions properly presented the question of fact to the jury because the eliminated entirely the assumption of risk by the employe of the negligence of the master. He will not be allowed, of course, to say that he did not see or hear the things which persons of ordinary faculties could see and hear under the same conditions. *Chicago, R. I. & P. Ry. Co. v. Houston* (1878), 95 U. S. 697, 24 L. Ed. 542. Plaintiff Ward testified that the handling of the cut of cars when moved from its position in train 92 until it was taken over the hump to the east was ordinary and usual up to that point (57). He was warned by defendant Carney that he was going to hand him "quite a bundle," which indicated that the cut of cars to be moved down the diagonal, or lead track, to track No. 10, where new train 92 was being made up, was large (28). Immediately after this warning, plaintiff Ward started to move from his position on the middle of the top of the car toward the brake and assigns this as the reason for his action:

"A. What is the—— The amount of cars I had in there I knew this one brake wasn't going to hold them." (29).

He stepped about ten feet on the running board to the brake 324 and while stooping over the brake wheel, the slack ran out of this car upon which he was and he fell over the end (29-30). After he communicated the proceed signal to the switchman near the engine and the engine began to move westward with this cut of cars, he saw no signal and both Carney's and switchman Houk's lanterns were out of his view. The engine ceased to exhaust and then he began to move from the center of the car in which he was toward the brake wheel to tighten the brake (29). The slack had run out of the cars between him and the engine (29-30) and there must have been sufficient noise for him to have known that the slack was running out of the cut of cars on which he was riding. He stated that there was no customary speed at which the cars were handled in the yard (60), so he would be charged with the knowledge that they might run at varying rates of speed. He stated that the speed of the cars prior to the accident was not nearly so rapid as he had seen it (60). He therefore must have had some knowledge of the speed at which the cars were moving. He further stated that the speed had been reduced from four or five miles an hour at which

the cut of cars moved westward immediately after the engine started to move them, to between two and five miles an hour when the accident happened (60-61). In the face of these observations, he stated he did not know what was coming (41). Defendant Carney says that the speed of the cut of cars as it was moving westward before it had been slowed down was the ordinary one with cars in that quantity (106). Ward said he had seen much more rapid (60). Carney stated that the cars were handled in the usual manner (111, 114). Engineer Russel did also (133). Engineer Russel stated that the cars were reduced from a speed of six or seven miles an hour to three or four (133, 136). Carney stated that they were reduced from four or five miles an hour to two or three (114, 115). The speed of the car could not have been great because safety inspector G. S. Mulder, who was then working for the Rock Island,

325 found Ward's lantern on the car near the running board, laying on its side. It had not been rolled off of the top by

the movement of the car when the slack was run out of it. This would indicate that it was not a very rapid movement, either before or after the accident, and that there was no unusual jerk when the slack ran out, although Mulder heard a noise which he thought indicated a kind of a jerk (73). After the engine had ceased to exhaust, which Ward heard (29), the slack ran out of the cars gradually (Carney 107), but made a noise which was easily noticeable to a man accustomed to handling cars and who knew what the running out of slack meant (Carney 109; Russel 133). It was to apprise Ward of the danger in handling the unusual number of cars that Carney gave him the warning that he would "hand him quite a bundle" (28, 122). It was also to assist Ward in handling the unusual number of cars after he had been warned of it that Carney slowed the engine down (Carney 105). Ward knew, from his experience, that you could only uncouple cars on the rebound, after the slack had run out (Ward 38). Carney corroborates this with his experience (Carney 110, 113).

Ward, then, knew from the warning that he had an unusual number of cars to handle in this cut. He knew the speed at which the engine was moving the cars when they started in on the lead track. He heard the engine cease to exhaust. He could have heard, because others heard about him, the running out of the slack in the cars between him and the engine. The cars, when the accident happened, were going slowly and from his experience, he might expect any kind of speed in the handling of the cuts of cars. If it was negligence, as Ward contended, to reduce the speed of the cars from four or five miles an hour to from two to five, as he stated, there was a change in the handling of the cars which he could have known if he had listened to the movement and which he might have anticipated as a result of his warning and the unusual number in

326 the cut. The facts, we insist, at least, raised issues which should have been submitted to the jury under proper instructions on the assumption of the risk of the master's negligence. The opinion seems not to have considered this feature of the case in connection with the instructions, because it is disposed of in one para-

graph immediately following the quotation from the case of *Devine v. Chicago, R. I. & P. Ry. Co.*, the Justice saying that they "were questions of fact and were properly submitted to the jury under a proper definition of negligence." They involve more than a definition of negligence, in our judgment, and have not been properly submitted to the jury in view of the instructions of the court on the assumption of risk. We believe that it is only fair to say that the facts which we have just referred to in the record present a number of questions, among which are: whether it was negligence on Carney's part, after warning Ward, to slow the cut of cars down so they could be more easily handled by Ward; whether it was negligence on the part of Ward to fail to recognize the change in the speed and in the manner of handling the cars, as a result of the slack running out between the car on which he was and the engine which was moving the cut; whether it was negligence in Ward not to anticipate the change in the handling of the cars because of the unusual number; whether or not it was negligence in Ward to fail to anticipate the handling of this cut of cars at the speed at which it was handled in view of the fact that there was no certain speed at which the cars were handled and that any speed might be anticipated by him in the yards there; whether or not, if he did fail to anticipate the cars being given to him at the speed at which they were and failed to heed the chucking noise which he knew indicated the running out of slack in

the cut and failed to note the significance of the reduced speed of the cars in the cut and failed to act upon the warning which he had been given and these other facts which he

327 could have known, and undoubtedly did know, because others in the same circumstances knew these facts; whether, in view of all these facts, he did not assume the risk of the negligent handling of the cars in this manner, if it was a negligent handling—all these are questions which directly relate to Ward's assumption of the risk and which, in the language of the court, the jury were expressly told Ward did not assume, it being Ward's theory of the case that the reduction of the speed was a negligent act on the part of defendant Carney.

It seems so clear to us as to be axiomatic that when a portion of the charge omits one element which is necessary to a proper statement of the doctrine, that the giving of the charge amounts to reversible error. As Justice Van Devanter said, the objection in this case is being urged, not on the failure to instruct, but as "a prejudicial misdirection" (*Missouri, K. & T. Ry. Co. v. Wilhoit*, C. C. A. 8th C., 1908, 160 Fed. 440, 445).

Second, Erroneous Instructions Relating to (a) Assumption of Risk.

The discussion of the erroneous instructions on the question of assumption of risk has been covered, so far as we think it necessary to present to the court our objections to the opinion, in the foregoing argument. We, however, cannot refrain from calling the attention of the court again to the case of *Boldt v. Pennsylvania R. Co.* (C. C. A. 2nd C., 1914), 218 Fed. 367, which was cited in our former brief

but which we believe did not receive the consideration from the court that its similarity and merit warrant. The only point raised in that case was the one which has been the subject of discussion in this one. The plaintiff asked the court to charge "the risk the employe now assumes since the passage of the Federal Employers' Liability Act is the ordinary dangers incident to his employment which does not now include the assumption of risk incident to the negligence of defendant's officers, agents or employes. It will be noted that this is but another way of stating what the trial court in this case stated in instruction No. 11 quoted from above. The court said, with reference to this instruction, speaking by Circuit Judge La Combe:

P. 368: "We think the plaintiff was not entitled to have the jury instructed in the manner he requested. If negligent operation of the cars by deceased's fellow servants caused the violent striking of the standing cars by other cars running down from the hump, it was a negligent operation of almost daily occurrence. There was no rule to regulate the speed of the moving cars, and the practice of running them down on standing cars was a practice usual in this yard and in other railroad yards generally. Defendant presumably assumed that the enforcement of rule 180 would make the practice harmless. If it was a negligent mode of operation, it was a mode obvious to deceased, and we cannot see why, under the Seaboard Air Line Case, *supra*, the jury might not find that such usual operation was a risk which he assumed."

We cannot but feel that the court, in reviewing the record in this case, has been under a misapprehension in connection with it. The plaintiff's own experience in railroad work and his perfect familiarity with the manner of handling trains and cars in Rock Island service of every description in which they are handled has made him an expert in the handling of cars as well as in giving his testimony in the case.

The injuries were slight. He testified that he had had flat foot from infancy (166). This was the most serious injury of which he complained at the time of the trial and which he alleged was due to his fall. He stated to the first man who found him on the night of the accident that he had fallen off the car (Mulder, 75). The whole record convinces us, with our experience in two trials of this case, that the damage suit was an after thought and developed from other

329 facts than those indicating the liability on the part of the company or a serious injury to the plaintiff. We believe this action is the result of a conspiracy to defraud, supported in the trial court by much incompetent evidence, admitted over the objection and exception of the defendant, with testimony as to the extent of his injuries supported largely by those whose diagnosis would not be accepted by any one of us connected with this case in private practice and that this case has been affirmed by this court on the doctrine of harmless error, inadvertently, in spite of these things.

We have always believed that appellate courts, when convinced of the merit of an appeal, would decide the case in accordance with the

principles of justice as they appeared to them. We still announce our belief in this proposition.

Respectfully submitted,

R. J. ROBERTS,
C. O. BLAKE,
W. H. MOORE,
J. E. DU MARS,
ABERNATHY & HOWELL.

Dec, 4, 1917.

330 Thereafter, at the December, 1917, Term of said Supreme Court, on the 12th day of December, 1917, the following proceeding was had in said cause, to wit:

#7646.

C., R. I. & P. R. Co.

vs.

FRED WARD.

And now on this day it is ordered by the court that the mandate in the above cause be stayed pending petition for rehearing.

331 Thereafter, on the 20th day of December, 1917, the following proceeding was had in said cause, to wit:

#7646.

C., R. I. & P. R. Co.

vs.

FRED WARD.

And now on this Dec. 20, 1917, it is ordered by the court that leave be granted plaintiff in error to file supplemental brief in the above cause.

332 Thereafter, at the April, 1918, Term of said Supreme Court, on the 4th day of June, 1918, the following proceeding was had in said cause, to wit:

#7646.

C., R. I. & P. R. Co.

vs.

FRED WARD.

And now on this day the opinion of the court filed in the above cause is withdrawn for correction, and as corrected said opinion is

ordered refiled, and the petition for rehearing filed in said cause is hereby denied.

333 Filed in Supreme Court of Oklahoma Jun- 4, 1918. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 7646.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and A. J. CARNEY, Plaintiffs in Error,

v.

FRED WARD, Defendant in Error.

Syllabus.

I.

Under the Federal Employers' Liability Act the servant assumes all the ordinary risks of his employment which are known to him or which could have been known by the exercise of ordinary care to a person of reasonable prudence and diligence in like circumstances. Risks not naturally incident to the occupation, but which arise from the negligence of the master, are not assumed by the servant until he becomes aware of such negligence and of the risk arising therefrom, unless the negligence and risk are so apparent and obvious that an ordinarily careful person would observe the one and appreciate the other. Whether the risk is an ordinary risk of the employment, or an extraordinary risk known to the servant, or with knowledge of which he is chargeable, is a question of fact to be submitted to the jury.

II.

Plaintiff sued defendant for injuries sustained in falling from a box car, alleging the failure to uncouple and the sudden and unusual stopping of the string of cars on which he was working constituted negligence. The court instructed the jury that plaintiff assumed all the ordinary and usual risks of the employment of which he had knowledge, or should, in the exercise of reasonable care, have known to exist, but that he did not assume such risks as were created by the master's negligence. Held, The servant does assume risks arising from the negligence of the master after he becomes aware of such negligence and risks, or when they are so apparent and obvious that an ordinarily careful person would observe the one and appreciate the other, hence that portion of the instruction to the effect he did not assume such risk was error, but, applied to the facts in this case, was not prejudicial, for the reason, if

the failing to uncouple and the sudden stopping of the cars amounted to negligence of the master, and the risk caused thereby was not a usual risk of the employment, such risk being coincident with the injury was not assumed by the plaintiff because he could not have had knowledge of it.

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III.

Instructions to the effect that contributory negligence is a bar to the servant's recovery under the terms of the Federal Employers' Liability Act is not a correct statement of the law, but being error in the master's favor, is not sufficient to reverse the judgment based upon the master's negligence.

IV.

The requirement of the U. S. Const., 7th Amendment, that trials by jury be according to the course of the common law, i. e., by unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the Employers' Liability Act of April 22, 1908, (35 Stat. L. 65, chapt. 149, Comp. Stat. 1913, Sec. 8357), and such courts may, therefore, give effect in actions under that statute to a local practice permitting a less than unanimous verdict.

Error from the Superior Court of Pottawatomie County.

Hon. Leander G. Pittman, Judge.

Affirmed.

(On Rehearing.)

R. J. Roberts, C. O. Blake, W. H. Moore, K. W. Shartel, and Abernathy & Howell, Attorneys for Plaintiffs in error.

T. G. Cutlip, W. S. Pendleton, and R. A. Rogers, Attorneys for Defendant in error.

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Opinion of the Court by

OWEN, J.:

Fred Ward, plaintiff in the trial court, was employed by the railway company in the capacity of switchman, and while working on the top of a moving box car in the railway company's switch yards at Shawnee, was injured by falling from the car. He sued the railway company for negligence in the manner of switching the cars on which he was working, alleging that the engine foreman, an employe of the company, negligently directed the engineer to stop and suddenly check the cars in such manner as to cause him to lose his balance and fall. He alleges that it was the duty of the engine foreman to uncouple the cars from the switch engine as soon as they were shoved upon the switch tracks, thereby permitting the cars to

run down grade and be stopped by plaintiff, and that the failure of the foreman to discharge this duty and the sudden stopping of the cars amounted to negligence and was the proximate cause of his injury. The defendants answered by general denial and by alleging assumption of risk and contributory negligence on part of the plaintiff. Judgment below was for plaintiff. Defendants bring the case here.

To reverse the judgment of the lower court plaintiffs in error urge two assignments. First, the motion for an instructed verdict for defendants should have been sustained because the plaintiff assumed the risk of the injury as a matter of law. Second, erroneous instructions relating to (a) assumption of risk, (b) majority verdict and (c) contributory negligence.

Under the first assignment plaintiffs in error insist that the proof brings the case within the provisions of the Federal Employers' Liability Act, and that under the terms of this act defendant assumed the risk complained of. Neither of the defendants in their answer claimed the benefits of the Federal Employers' Liability Act, or made any reference to the car from which the plaintiff fell being engaged in interstate commerce. Assuming, without deciding, that merely

proving the car was part of an interstate commerce ship-
336 ment was sufficient to bring the case within the terms of the

Federal Act, it does not follow that the lower court should have directed a verdict for defendant. For the reason that under the terms of the Federal Employers' Liability Act, the plaintiff assumed only the ordinary and usual dangers incident to the employment, which were known to him, or which could have been known with the exercise of ordinary care by a person of reasonable prudence and diligence under like circumstances. It may be said that a railway brakeman, working upon the top of moving box cars is engaged in a hazardous business and is at any time liable to serious injury and that he assumes this risk when entering upon the employment. But the servant does not assume the risk incident to the negligence of the master until he becomes aware of such negligence and of the risk arising therefrom, unless the negligence and risk are so apparent and obvious that an ordinarily careful person would observe the one and appreciate the other. *C. R. I. & P. Ry. Co. v. Hughes* (Okla.), 166 Pac. 411; *M. O. & G. Ry. Co. v. Overmyre* (Okla.), 160 Pac. 933; *Seaboard A. L. R. Co. v. Horton*, 233 U. S., 58 L. Ed. 1062. In this case plaintiff alleged the failure to uncouple and the forcible and sudden stopping of the cars with unusual violence amounted to negligence. It cannot be said as a matter of law that he assumed the risk incident to this method of switching if the allegation be true. In the case of *Devine v. C. R. I. & P. Ry. Co.*, 266 Ill. 248, 107 N. E. 595, it was held:

"Where a brakeman is killed by being thrown from the top of a car by the negligence of the engineer in suddenly stopping the train with unnecessary violence, the risk of such negligence is not one assumed by the deceased."

Whether the risk was an ordinary one of the employment assumed by the servant, or one arising from the negligence of the master, and with which the plaintiff was or was not chargeable, was a question of fact to be determined by the jury. Section 6, Art. 23, Const., (355 Williams' Ann.), M. O. & G. Ry. Co. v. Overmyre, 337 *supra*.

Under the second assignment plaintiffs in error complain of the instructions dealing with the assumption of risk and contributory negligence. As to contributory negligence, the jury was instructed the plaintiff could not recover if his negligence contributed to the injury. This was not a correct statement of the law, but the error is one of which the defendant cannot complain. Under the Federal Employers' Liability Act contributory negligence goes only in mitigation or to reduce the damage. It is a comparative defense and not a defense in bar.

The instructions complained of as to the assumption of risk, taken as a whole, are to the effect that plaintiff assumed all the ordinary and usual risks and perils incident to the employment, whether they be dangerous or otherwise, and also all risks which he knew or should, in the exercise of reasonable care, have known to exist. But in Paragraph 11 appears the following language:

"He does not, however, assume such risks as are created by the master's negligence."

The servant does assume the risks incident to the master's negligence after he becomes aware of the same, or where the negligence and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. C. R. I. & P. Ry. Co. v. Hughes, *supra*. It was not a correct statement of the rule to instruct the jury without qualification that plaintiff did not assume such risks as were created by the master's negligence. It does not necessarily follow, however, that the case must be reversed for that reason. The negligence complained of was the failure to uncouple the cars and the sudden stopping with such force as to throw plaintiff from the top of the box car. If this was an unusual method of switching and amounted to negligence, in the nature of things, plaintiff could not have been aware of the negligence previous to the injury so as to have assumed the risk incident thereto. It was a question of fact, as has been said, to be determined by the jury whether this method of switching was usual or amounted to negligence.

The jury was instructed that plaintiff could not re-
338 cover unless this method amounted to negligence, or if it was a usual and ordinary risk of the employment. The jury must have found that it amounted to negligence and was not the usual method of switching and an ordinary risk. Therefore, the jury was not misled by the failure of the court to qualify the instruction that the plaintiff did assume the dangers incident to the master's negligence of which he was aware. Under Sec. 6005, R. L. 1910, we may not set aside the verdict for this reason unless, after an examination of the entire record, it appears that the error complained of has probably resulted in the miscarriage of justice.

It is further contended, under the second assignment, that the court erred in receiving a verdict signed by nine jurors. It is insisted that the proof bringing the case within the terms of the Federal Employers' Liability Act, the railway company was entitled to a unanimous verdict of twelve. That is to say, because the cause of action arose under a Federal statute the case must be tried according to Federal procedure requiring a jury of twelve. This contention was made in the case of St. L. & S. F. Ry. Co. v. Brown, 45 Okla. 143, 144 Pac. 1075, and denied by this Court. In affirming this Court in that case, the Supreme Court of the United States said:

"The requirement of the U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, i. e., a unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, Chapt. 149, Comp. Stat. 1913, sec. 8657), and such courts may, therefore, give effect in actions under that statute to local practice permitting a less than unanimous verdict." (241 U. S. 223, 60 L. Ed.)

Finding no reversible error, the judgment of the lower court is affirmed.

All the Justices concur, except Sharp, C. J., dissenting.

339 Thereafter, at the June, 1918, Term of said Supreme Court, on the 12th day of June, 1918, the following proceeding was had in said cause, to-wit:

7646.

C., R. I. & P. R. Co.

vs.

FRED WARD.

And now on this day it is ordered by the court that the mandate in the above cause be stayed for a period of 30 days pending application for writ of error to U. S. Supreme Court.

340 I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 339 pages, numbered from 1 to 339, both inclusive, are a full, true and complete transcript of the record and all proceedings in said Supreme Court in case No. 7646, Chicago, Rock Island & Pacific Railway Company, Plaintiff in error, versus Fred Ward, Defendant in error, as the same remain of record and on file in my office.

In witness whereof, I hereto subscribe my name and affix seal of said Supreme Court, at Oklahoma, Oklahoma, this 10 day of July, 1918.

[Seal Supreme Court, State of Oklahoma.]

WM. M FRANKLIN,
Clerk Supreme Court of Oklahoma,
By JESSIE PARDOE,
Deputy.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Being informed that there is now pending before you a suit in which The Chicago, Rock Island and Pacific Railway Company and A. J. Carney are plaintiffs in error, and Fred Ward is defendant in error, No. 7646, which suit was removed into the said Supreme Court by virtue of a writ of error to the Superior Court of Pottawatomie County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,725. Supreme Court of the United States, No. 639, October Term, 1918. The Chicago, Rock Island & Pacific Railway Company et al. vs. Fred Ward. Writ of Certiorari.

In the Supreme Court of the State of Oklahoma.

Filed in Supreme Court of Oklahoma Jan. 10, 1919. William M. Franklin, Clerk.

No. 7646.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
 A. J. CARNEY, Plaintiffs in Error,

vs.

FRED WARD, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed that the typewritten copy of the record and proceedings in the Supreme Court of Oklahoma, duly certified by the Clerk thereof, which was filed with the Clerk of the Supreme Court of the United States on the 26th day of August, 1918, may be used by the Clerk of the Supreme Court of Oklahoma

as a true, full, complete and correct record of the proceedings in the Supreme Court of Oklahoma in making his return to the writ of certiorari issued October 31, 1918, to review said proceedings in the said Supreme Court of Oklahoma.

C. O. BLAKE,
R. J. ROBERTS,
J. E. DU MARS,
Attorneys for Plaintiffs in Error,
W. S. PENDLETON,
T. G. CUTLIP,
Attorneys for Defendant in Error.

[Endorsed:] No. 7646. The Chicago, Rock Island and Pacific Railway Company and A. J. Carney, Plaintiffs in Error, vs. Fred Ward, Defendant in Error. Stipulation. Received Jan. 10, 1919. William M. Franklin, Clerk.

In the Supreme Court of the United States.

No. 26725.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY and
A. J. CARNEY

vs.

FRED WARD.

Return to Writ.

In obedience to the commands of the within writ, and the terms of the within Stipulation of parties as to what shall constitute the record on appeal, I herewith transmit to the Supreme Court of the United States as a return to said Writ, said stipulation, and a printed copy of the record herein, prepared under the directions of the Clerk of the Supreme Court of the United States.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, this 10th day of January, 1919.

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN,
Clerk Supreme Court of the State of Oklahoma,
By N. C. ORR, Assistant.

[Endorsed:] File No. 26,725. Supreme Court U. S., October Term, 1918. Term No. 639. The Chicago, Rock Island & Pacific Ry. Co. et al., Petitioners, vs. Fred Ward. Writ of certiorari and return. Filed Jan. 13, 1919.

In

THE

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No. 306

Office Supreme Court,
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JAMES D. MAH

No. 689198

In the Supreme Court of the United States

APRIL TERM, 1918.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND A. J. CARNEY, PETITIONERS,

•

FRED WARD, RESPONDENT.

**APPLICATION FOR WRIT OF CERTIORARI AND
BRIEF OF PETITIONERS.**

No. 806—August 12, 1918.

Harlow—Oklahoma City.

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In the Supreme Court of the United States

APRIL TERM, 1918.

THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY, AND
A. J. CARNEY,
Petitioners,

No. —.

v.

FRED WARD,
Respondent.

APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Come now the above named petitioners and file this, their application to this Honorable Court to grant a writ of certiorari to review the proceedings of the Supreme Court of the State of Oklahoma in a case therein,

No. 7646, in which The Chicago, Rock Island and Pacific Railway Company, a corporation, and A. J. Carney were plaintiffs in error, and Fred Ward was defendant in error, and states:

Fred Ward began an action in the Superior Court of Pottawatomie County, February 17, 1914, against The Chicago, Rock Island and Pacific Railway Company, a corporation, and A. J. Carney, the engine foreman of the switch crew, for Ten Thousand (\$10,000.00) dollars damages for personal injuries alleged to have been sustained by him December 10, 1913 at Shawnee, Pottawatomie County, Oklahoma, while employed as a switchman in the yards of the said The Chicago, Rock Island and Pacific Railway Company, while a member of a crew of which A. J. Carney was engine foreman.

The allegations of negligence were shutting off the steam on the engine and applying the air brakes thereon by direction of said engine foreman, A. J. Carney, causing the cut of ears upon which the plaintiff was riding to slow up quickly and cause the plaintiff to fall over the end of the most distant car from the engine, at which point he was undertaking to set a brake on said car. The injuries alleged were bruising and spraining the hip joint and injury to plaintiff's left foot resulting in a flat foot due to his fall from the top of the car and striking against the coupler on the end of said car as he

fell and the force of his weight as he fell alighting on his left foot between the rails of said track. He lost his balance, fell to the ground and rolled over fast enough to get out of the way of the cars, which were not entirely stopped, and pulled himself over the outside rail and got off the track in time to avoid being run over by the cars.

The answer of the defendant, A. J. Carney, was a general denial.

The answer of The Chicago, Rock Island and Pacific Railway Company consisted of a general denial, contributory negligence and assumption of risk. A trial was had and verdict rendered October 23, 1914, in favor of the plaintiff and against the defendant, A. J. Carney and The Chicago, Rock Island and Pacific Railway Company, for the sum of One thousand (\$1000.00) dollars. The separate motions of the defendant, A. J. Carney and The Chicago, Rock Island and Pacific Railway Company, for a new trial were granted and said judgment set aside. The trial of said cause was subsequently had and a verdict returned for the plaintiff February 26, 1915 for three thousand (\$3,000.00) dollars against the defendants, A. J. Carney and The Chicago, Rock Island and Pacific Railway Company. The separate motions for a new trial of The Chicago, Rock Island and Pacific Railway Company and A. J. Carney were overruled and judgment entered upon the verdict.

An appeal from the order of the trial court denying the separate motions of A. J. Carney and The Chicago, Rock Island and Pacific Railway Company for a new trial was taken to the Supreme Court of Oklahoma. On October 31, 1916, an opinion by Commissioner Edwards, of the Supreme Court Commission of the State of Oklahoma, was published reversing the cause. Upon petition for rehearing an opinion was published November 20, 1917, by Owen, Justice of the Supreme Court of Oklahoma, affirming the judgment of the trial court. After the filing of the petition for rehearing by the plaintiff in error, a second opinion by Mr. Justice Owen of the Supreme Court of Oklahoma, was handed down June 14, 1918 affirming the judgment of the trial court, Sharp, Chief Justice, dissenting.

The evidence at the trial of the cause disclosed that Fred Ward was working with an engine crew, consisting of foreman, A. J. Carney, Switchehman McBroom, Mulder, Houk and Rowe besides himself, Engineer Russell, and Fireman Sparks, on the night of December 10, 1913, on which night the accident occurred; that an eastbound freight train, No. 92, composed of 60 or 70 cars, came into the Shawnee yards from the west; that it was the duty of this crew to break up this train, which had arrived, and separate the cars into two classes, local or through freight, to be handled by two eastbound trains, starting from

Shawnee. The cabooses for these two trains were placed on tracks No. 8 and No. 10 and the cars from this No. 92, which was being broken up, were to be placed with these cabooses.

There were thirteen tracks besides the main line in the Shawnee yards, which were used for switching. A diagonal or lead track runs from the main line in a southwesterly direction on the south side of the main line and connects with tracks 6, 7, 8, 9, and 10. The yard is what is known as a gravity yard. The cars, if left to their own course, move slowly by force of gravity in both directions from a central ridge or hump, the ridge being just east of the switch which leads from the main line to the lead track connecting with tracks 6, 7, 8, 9, and 10, on the south. A car shanty and scale house, referred to in the testimony, were located between the main line on the south side and the diagonal lead track.

The train which was to be broken up, came in and stopped on the main line west of the ridge or hump and of the switch connecting the main line and the lead track. The road engine was cut off and taken to the roundhouse. The switching crew, with the engine headed west, under the direction of A. J. Carney, foreman, including the plaintiff, then approached the train on the main line to break it up. Switchman McBroom was releasing the air on the cars, one cut of which had

been moved eastward and placed. The switch engine and crew came back to the train for more cars. Foreman Carney and Plaintiff Ward were walking down the side of the remaining cars in train No. 92, Foreman Carney checking the cars and Plaintiff Ward bleeding or releasing the air. When they had walked about half the length of the train from the front end, the plaintiff uncoupled a "cut" of cars from the remainder of the train by pulling the pin and thereupon gave a back-up signal to the engine, which had coupled on to the east end of this cut. Foreman Carney had climbed the ladder on the side of the box car, after instructing the plaintiff to cut the cars. Plaintiff had also climbed upon the side of the car, after having uncoupled them, and gave the signal to pull the cars eastward. Foreman Carney remarked to plaintiff: "10 and the main line all the way," which meant that a certain number of this cut of twenty-two cars was to be placed on track No. 10 with the caboose and the remainder of the cut were to be returned to the main line afterward. Switchman McBroom was instructed to go down the lead track in a southwesterly direction and turn the switch so that the cars from the lead would go in on track No. 10 with the caboose. Plaintiff and Foreman Carney rode the cars eastward until they passed the switch to the lead track and also passed over the crest or hump of the gravity yard. The engine stopped with the cars, Foreman

Carney got off the car to the ground, near the switch, the plaintiff remaining on the cut. After turning the switch for the lead or diagonal track, Foreman Carney gave a signal. Plaintiff took the signal and transmitted it to the engineer through a switchman on the front end of this cut of about twenty-two cars. Plaintiff saw the switchman's light and afterwards learned Switchman Houk was the man at that place. This signal directed the engineer, headed west, to push the cars westward. As the car upon which the plaintiff was riding was passing over the switch going on to the lead track, it passed Foreman Carney, who hallooed to the plaintiff: "Look out, Honey, I am going to hand you quite a bundle." The cars were then backed southwesterly on the lead track, around the curve. The plaintiff could not then see Foreman Carney. He heard the engine cease to exhaust. This occurred when the cut of cars, on which the plaintiff was and which were to be uncoupled from the remainder, had traveled about three car lengths on the lead track. They traveled about seven car lengths after this. The speed before the cut began to slow down was four or five miles an hour. They slowed down to a speed of about two or three miles an hour. The plaintiff was on the roof of the car, about midway distant from either end. He started to the west end to set the brake with a brake stick. The engine had slowed up, upon signal, because

the speed in passing over the switch and on to the lead track was too fast for one man to control the cars as they went to switch No. 10. When the engine slowed up it lessened the speed of the first car coupled to it, the slack run out and the second car's speed was likewise lessened. Its speed run out and the third car's speed was likewise lessened, and so on until the slack reached the last car, upon which the plaintiff was. When the slack began to run out it made considerable noise caused by the creaking of the couplers and draw-bars and the rattle of the knuckles as the slack was taken out of one car after another. The noise was noticeable to foreman Carney, near the switch from the main line to the lead, and to switchman Mulder, who was down near track No. 10, who noticed the jerking noise as the slack went out. The plaintiff undertook to tighten the brake with his brake stick and when the slack ran out the cars were uncoupled by foreman Carney, who was on the ground. As the rebound came, plaintiff, facing due west, fell over the west end of the car, grabbing the brake beam with his left hand, swinging his body around so that he faced the south, causing his left hand to be torn loose from the brake wheel as he fell, lighting on his feet between the rails of the track, about three feet in front of this car from which he had fallen, which had been reduced to a speed of from two to five miles an hour, the coupler striking him

in the left portion of his back and hip and throwing him forward loosening his feet, which had caught between the guard rail and the main rail. Plaintiff then rolled over in front of the car, for about two-thirds of a car length, until he was enabled to roll over the north rail out of the way of the approaching car, the wheels of which did not touch his body, but which did cut his clothing.

Three opinions were handed down by the Supreme Court of Oklahoma in this case. The first opinion was written by Commissioner Edwards, reversing the judgment of the trial court, and published by the court October 31, 1916 (Tr. 286-293). A petition for rehearing was filed by the defendant in error and after the oral argument the second opinion, written by Mr. Justice Owen of the Supreme Court, was handed down November 20, 1917. We have incorporated this opinion in this brief as Appendix "B."

A petition for rehearing was then filed by plaintiffs in error. Plaintiffs in error filed a supplemental brief, by the authority of the court (Tr. 331), which is incorporated in this brief as Appendix "A." The opinion of Mr. Justice Owen was ordered "withdrawn for correction and as corrected said opinion is ordered refiled" June 4, 1918. The opinion as corrected is found in the transcript at pages 333-338. The first opinion by Mr. Justice Owen, which was withdrawn for correction and

which is incorporated in this brief as Appendix "B," shows by brackets the portions which have been omitted from the first opinion and by italics the additional parts inserted in the second opinion. The last opinion of June 4, 1918, affirmed the judgment of the trial court in favor of defendant in error. This was done upon the grounds (1) that a question of fact was raised on the record as to whether or not the plaintiff assumed the risk; (2) that although the instructions on assumption of risk and contributory negligence were both erroneous, that the error was harmless under Sec. 6005 of the R. L. of 1910 Okla., which requires the affirmance of all judgments appealed from "unless after an examination of the entire record it appears that the error complained of has probably resulted in the miscarriage of justice;" and (3) that carriers are not entitled to a unanimous verdict in cases brought under the Federal Employers' Liability Act, but that the rendition of the verdict by a majority of the jury is authorized.

Your petitioner contends that there was error in the submission to the jury by the trial court of the question of whether or not the plaintiff had assumed the risk of his injuries as one necessarily incident to the performance of the work in which he was then engaged and the affirmance of said judgment by the Supreme Court of Oklahoma in spite of this error; that it was error to submit to the jury by the trial court the ques-

tion of whether or not the plaintiff assumed the risk of his injuries as a result of the manner in which the work was done, which was alleged to have been negligent, without submitting to the jury proper instructions upon the question of assumption of risk as a question of fact, permitting the jury to consider the question of whether or not the plaintiff assumed the risk of the master's alleged negligence, and by the Supreme Court of Oklahoma in affirming said judgment in spite of said error; that it was error in the trial court to submit the questions of fact in the case with reference to assumption of risk as a matter of law and assumption of risk as a question of fact under instructions which were "not a correct statement of the rule" (Tr. 237), and as to contributory negligence, which "was not a correct statement of the law, but the error is one of which the defendant cannot complain" (Tr. 337), and by the Supreme Court of Oklahoma in affirming the position of the trial court in spite of these admissions contained in its opinion and decision, that said instructions were erroneous; and that it was error for the Supreme Court of the State of Oklahoma to affirm the judgment of the trial court and hold the admittedly erroneous instructions on assumption of risk and contributory negligence harmless upon the ground that "under Sec. 6005, R. L. 1910, we may not set aside the verdict for this reason, unless, after an examination of the entire record, it

appears that the error complained of has probably resulted in the miscarriage of justice" (Tr. 338).

Your petitioner has no right of appeal or writ of error herein to this honorable court in view of the amendment of September 6, 1916, to the statutes, providing for review by writ of error to this court, and the absence of a question involving the validity of a statute in the record in this case. The Supreme Court of Oklahoma has stayed the mandate to give time for the presentation and determination of this application for writ of certiorari.

Your petitioners present herewith, as a part of this petition, a brief showing more fully the views on the questions involved and a transcript of the record in the Supreme Court of the State of Oklahoma.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of the State of Oklahoma, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court of Oklahoma in this case, which was entitled in that court, "The Chicago, Rock Island and Pacific Railway Company, and A. J. Carney, plaintiffs in error, vs. Fred Ward, defendant in error, No. 7646," to the end that said cause may be

reviewed and determined by this court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate; and that the said judgment of the said Supreme Court of Oklahoma may be reversed by this honorable court.

THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY, and A. J. CARNEY,

By R. Roberts Corbly

W. H. Moore & E. D. Munro

Attorneys for Petitioners.

Hal. P. Littlepage
Sidney J. Dailey
W. F. Dickinson

Of Counsel.

August 12, 1918.

In the Supreme Court of the United States

THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY and A. J. CARNEY,
Petitioners,

vs.

FRED WARD,
Respondent.

} No. —.

BRIEF OF PETITIONERS.

STATEMENT OF CASE.

[Figures in parentheses refer to paging of the type-written transcript.]

Fred Ward, hereinafter called plaintiff, began an action in the Superior Court of Pottawatomie County, State of Oklahoma, February 17, 1914, against The Chicago, Rock Island and Pacific Railway Company, a corporation, and A. J. Carney, an individual, hereinafter called defendants, praying for damages in the sum of ten thousand (\$10,000.00) dollars for personal injuries

to his left foot, back and hip, due to a fall from a box car upon which he was working, while engaged as a switchman in the yards of The Chicago, Rock Island and Pacific Railway Company at Shawnee, Oklahoma, about December 10, 1913.

The petition, setting forth the issues, was filed on the same day.

Paragraph one of the petition alleged the incorporation of The Chicago, Rock Island and Pacific Railway Company and that it conducted the business of a common carrier. It alleged the residence of A. J. Carney to be in the County of Pottawatomie, State of Oklahoma.

Paragraph two of the petition alleged that the Railway Company owned and operated extensive shops and switching grounds in the city of Shawnee, Oklahoma, and that the plaintiff was employed as a switchman at said yards on or about December 10, 1913, and worked under A. J. Carney, an engine foreman, who was his superior officer.

Paragraph three of the petition alleged that about 10:00 P. M., about twenty freight cars in said city of Shawnee, Oklahoma, were being moved on the main line track, having been cut off from the train, which they were breaking up; were drawn eastward along said main line to be switched to a track known as No. 10, to

the south of said main line; that the tracks were so constructed that they formed what is known as a gravity yard and that the cars would roll in either direction from the "hump," or point at which the yard was highest, until stopped by the accompanying switchman; that it was the duty of the engine foreman to see that the said cars were cut loose from the engine and placed upon the switch leading to the track to which they were destined; that the plaintiff alone was on the top of the rear car of said cut; that it was A. J. Carney's duty to see that the cars were uncoupled from the engine when upon this track; that it was plaintiff's duty, when they were uncoupled, to regulate the speed and control the cars, stopping them at the proper place; that the car upon which plaintiff was, was about twenty cars distant from the engine, and knowing the cars should be uncoupled, and being unable to see the signals of the engine foreman, if any, noticed the engine ceasing to exhaust and went from the middle of the top of the last car to the most distant end to adjust the brake. Plaintiff averred the defendants caused the engineer to shut off the same and apply the brakes to retard the speed of the cut of cars upon which plaintiff was and which were to be uncoupled, which caused the engine to stop shoving the cars and their speed to be reduced, the checking occurring first with the car nearest the engine and being transmitted in turn to the other cars, reach-

ing the most distant car, upon which plaintiff was, as he was stooping over to adjust the brake and throwing him in front of said car to the ground, about twelve feet, injuring him; that he weighed about one hundred seventy pounds; that his hip joint was bruised and sprained and that his left foot struck with great force, injuring it, by reason of which alleged negligence of the engine foreman, A. J. Carney, in failing to promptly uncouple the cars, he asks damages for his injuries in the sum of ten thousand (\$10,000.00) dollars.

Answer.

The answer of defendant, A. J. Carney, was a general denial.

The answer of The Chicago, Rock Island and Pacific Railway Company consisted of four paragraphs.

The first paragraph admitted it was a corporation and averred that it was doing the business of an interstate common carrier into and through Pottawatomie County, State of Oklahoma.

The second paragraph of the answer averred that the injuries of the plaintiff, if received, were due to his own want of care and were not proximately due to any negligence on the part of the defendant or its agents.

The third paragraph of the answer averred that

the plaintiff's injuries were directly due to the risks and hazards of the work in which he was engaged at the time, which risks and hazards were appreciated by the plaintiff; that he was a man of mature years, experienced in the line of his vocation; that the method of doing the work at the time of the accident had not been changed from that at the time of his employment; that his injuries were proximately due to the known and appreciated risks in connection with the breaking up of trains and switching of cars, and that the plaintiff had, therefore, assumed the risk of said injuries and could not recover for the same.

The fourth paragraph of the answer averred that plaintiff's contributory negligence was the proximate cause of his alleged injuries and that it consisted of his failure to use the care and prudence of an ordinary man, under the circumstances, in noting the manner in which the cars were being handled prior to going from the middle of the car to the brake, where he was at the time he fell, and failed to take the proper precautions for his own safety in stooping over the brake, and failed to protect himself against the slack, which he knew would run out of the cars in the ordinary and usual handling, because of which he was barred from recovery.

The prayer asked for dismissal with costs.

A trial was had and a jury returned a verdict February 26, 1915, in favor of the plaintiff for three thousand (\$3,000.00) dollars, the same being signed by nine of their number.

Separate motions for a new trial were filed by The Chicago, Rock Island and Pacific Railway Company and A. J. Carney upon the grounds that the proceedings of the court and jury were irregular; on account of irregularities and misconduct on the part of the plaintiff; on account of misconduct of the jury; on account of accident and surprise; on account of excessive damages; on account of the assessment of the amount of the recovery; on account of newly discovered evidence which could not have been discovered previously; on account of errors of law; on account of being denied a fair trial in accordance with the guarantee of Section 7, Article 2, of the Oklahoma Constitution; on account of being deprived of a fair trial under the Federal guarantees of due process of law and equal protection of law, under the Constitution of the United States; on account of the refusal of certain requested instructions; on account of giving of certain instructions over exceptions; on account of failure to give the peremptory instruction of defendant; and on account of the bias and partiality of juror W. A. Denison, who had previously had a claim for personal injuries and had had trouble in the settlement of the same and had threatened his general fore-

man with personal violence and was hostile toward the defendant company; that said juror, during the deliberations of the jury, favored giving the plaintiff the highest sum named by any juror, and that all of said facts were concealed from the attorneys for the defendant by the juror upon his *voir dire* examination.

The separate motions of both defendants were overruled March 10, 1915, and judgment rendered in favor of the plaintiff and against the defendants and an appeal taken to the Supreme Court of the State of Oklahoma, where, on the 31st day of October, 1916, the Supreme Court Commission of the State of Oklahoma published an opinion, by Commissioner Edwards, reversing the cause. After the filing of the petition for rehearing and reargument of the case orally, an opinion, by Mr. Justice Owen, was published by the Supreme Court of Oklahoma on the 20th day of November, 1917, affirming the judgment of the trial court. Subsequently said opinion was modified and published on the 14th day of June, 1918, affirming the judgment of the trial court.

No petition for rehearing has been filed since the last mentioned date and said judgment has become final.

ARGUMENT.

I. The motion for a direct verdict should have Under Federal Decisions.

The motion of each of the defendants for an instructed verdict in its favor should have been sustained because:

(a) Plaintiff assumed the risk of the injury he received as one incident to the service in which he was engaged.

(b) Plaintiff assumed the risk of injury as one resulting from the alleged negligence, which he knew, or which was so obvious as to be apparent to an ordinary man under such circumstances.

(a) Plaintiff assumed the risk of the injury he received as one incident to the service in which he was engaged.

This question was brought to the attention of the trial court in defendant's requested instruction No. 2, which was refused, to which refusal an exception was allowed. The instruction is:

“You are instructed that the plaintiff as a part of his contract of employment agrees to assume all

the natural and ordinary risks of the employment and all the probable results thereof. You are instructed therefore if you find that the accident complained of in the petition of the plaintiff herein resulted from such risks and hazards incident to the service in which he was employed you will find no damages for the plaintiff and your verdict should be for the defendant" (197).

The petition of the plaintiff contained no allegations of interstate employment at the time of the accident to the plaintiff. The answer did not set up any averments to this effect. The evidence, however, identified the car as being engaged in interstate commerce at the time of the accident. The number of the car was stated by the plaintiff to be 56643 (78). Foreman Carney testified that the car was engaged in interstate commerce, as follows:

“Q. Mr. Carney, you say you checked this list; you say you checked these cars; do you remember the number of the car in the cut on which Mr. Ward was riding?

A. 56643, Rock Island.

Q. Where was that car going to?

A. It was going to New Orleans by way of Alexandria, La.

Q. Where was it from?

A. Wichita, Kas.” (118).

Defendants called the attention of the court to this proof showing the interstate character of the shipment

and the applicability of the Federal Employers' Liability Act to the case by requested instruction No. 1, which was refused by the court and an exception allowed. It is in words and figures as follows:

“You are instructed that the evidence in this case shows that plaintiff's accident occurred while switching car C., R. I. & P. Ry. Co. No. 56643 from train No. 92, coming into Shawnee, to another train No. 92, going out of Shawnee, and that said car was shipped from Wichita, Kansas, to Alexandria, Louisiana.

“You are therefore instructed that the rights of the parties in this case are determined by the Federal Employers' Liability Act of 1908 as defined in these instructions” (197).

The opinion by Commissioner Edwards (290) held this proof sufficient to make the Federal Employers' Liability Act applicable. In the last opinion of the court, by Mr. Justice Owen, it was *assumed* without being decided that the proof was sufficient to make the Federal Employers' Liability Act applicable (335-336). We insist that the proof is sufficient to bring the case under the Federal Employers' Liability Act upon the authority of the following cases:

Seaboard Air Line Ry. Co. v. Duvall (1912),
225 U. S. 476, 482, 56 L. Ed. 1171, 1174.
Missouri, K. & T. Ry. Co. v. Wulf (1913),
226 U. S. 570, 57 L. Ed. 355.
Troxel, Adm'x, v. Delaware, L. & W. R. Co.
(1913), 227 U. S. 434, 57 L. Ed. 586.

St. Louis & S. F. Ry. Co. v. Seale (1913),
229 U. S. 156, 161, 57 L. Ed. 1129, 1134.

Taylor v. Taylor (1914), 232 U. S. 365, 58
L. Ed. 638, 641.

Grand Tr. Ry. Co. v. Lindsay (1914), 233
U. S. 42, 58 L. Ed. 838, 842.

Wabash R. Co. v. Hayes (1914), 234 U. S. 88,
90, 58 L. Ed. 1226, 1230.

Central Vt. Ry. Co. v. White, Adm'x (1915),
238 U. S. 507, 513, 59 L. Ed. 1433, 1437.

Atlantic Coast Line R. Co. v. Mims, Adm'x
(1917), 242 U. S. 532, 61 L. Ed. 476.

The testimony of inspector March was to the effect that he found nothing out of order on the car (84). He made an accident report and testified that the equipment, brakes, etc., were in good condition and were constructed in compliance with the requirements of the Interstate Commerce Commission (145). This evidence, then, will eliminate the feature of defective appliances upon the car, 56643, on which the plaintiff was employed at the time of the accident.

Assumption of risk exists under the Federal Employers' Liability Act as it would at common law where there has been no breach by the master "of any statute enacted for the safety of employes." Mr. Justice Pitney, speaking for the Supreme Court of the United States in *Seaboard A. L. R. Co. v. Horton* (1914), 233 U. S. 492, 58 L. Ed. 1062, limited the statutes referred to in Section 4 of the Act (35 Stat. at L. 65) to Federal statutes, and recognized the existence of the doctrine

of assumption of risk as it existed at common law in the following paragraph:

p. 1069. "By the phrase 'any statute enacted for the safety of employees,' Congress evidently intended **Federal** statutes, such as the safety appliance acts (27 Stat. at L. 531, Chap. 196, U. S. Comp. Stat. 1901, p. 3174; 32 Stat. at L. 943, Chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314; 36 Stat. at L. 298, Chap. 160, U. S. Comp. Stat. Supp. 1911, p. 1333), and the hours of service act (34 Stat. at L. 1415, Chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer.

"It seems to us that Sec. 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking Secs. 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corre-

sponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible."

Plaintiff was an employe, who was skilled in his work and was thoroughly familiar with all of the risks and hazards incident to his occupation. He knew and had worked for many years under the rules in force on The Chicago, Rock Island and Pacific Railway Company at the time of the accident. He had been engaged in switching movements in connection with his various positions and knew well the conditions prevailing at the Shawnee switch yards and the methods employed there. At about the age of seventeen he began to do the work of a brakeman (71) and was employed continuously by The Chicago, Rock Island and Pacific Railway Company for a period of about three years, at the end of which time he was promoted to the position of conductor, which position he retained not quite two years. He then worked four or five years with the Iron Mountain as a switchman, a brief period of one month with the T. & P. Railway Company, and came back to The Chicago, Rock Island and Pacific Railway Company and began work at Shawnee October 16, 1913, two months prior to the accident.

The train, which was to be broken up, No. 92, came in from the west on the main line of the Shawnee yards and stopped, the road engine being uncoupled and re-

moved to the roundhouse. The switch engine and crew, in charge of foreman A. J. Carney, came down to break up this train. The switch engine was headed west, the main line running east and west. One cut of cars had been taken off of the front end of this train before the engine coupled onto the cut involved in plaintiff's accident. The plaintiff and foreman Carney were walking westward along the side of the train. The plaintiff was releasing the air from the cars and foreman Carney was checking the cars from his switch list. When they had reached a point about half way from the front end of the train, plaintiff uncoupled a cut of twenty-two cars. Foreman Carney and he climbed on top of the west car and the engine pulled the cars eastward and stopped, after they had crossed the ridge or hump, which made this switch yard a gravity yard. The cars would gradually move of their own force in either direction from this ridge or hump, which was about the center of the yard. The slope was to the east and to the west from the ridge. The slope was sufficient to make water run. The slope required an additional force from the switch engine to push this cut of cars over the hump as they were going toward track No. 10, where the caboose had been placed to which they were to be coupled. Foreman Carney had left the cut of cars as it approached the point at which it stopped. Plaintiff Ward was on the west car of the cut. Foreman Carney

threw the switch, which diverted the cars from the main line onto the lead track, which ran in a southwesterly direction toward tracks Nos. 8 and 10. Directions had been given to another of the employes to throw the switches so that these cars might pass along the lead track until they reached track No. 10, when they would go in on that track and connect up with the caboose. On account of the size of the cut, there being about eleven cars, which Ward was to take to track No. 10, and on account of the cars being on the east side of the ridge, the switch engine moved the cars over the ridge with more speed than it would have been safe for the eleven cars to have when in charge of one man going to track No. 10. The plaintiff said there had been no unusual movement of the cars in their handling up until the time when the engine began to push them over the hump onto the lead track, going to track No. 10 (64). Foreman Carney realized the speed of the cut was too great to enable one man, with the brakes, to control the cut of cars without damaging the property. He reduced it to about two or three miles an hour for this reason (112). When the cut of cars was being pushed over the ridge and onto the lead track, foreman Carney gave a warning to Ward, that he was about to receive an unusually large number of cars, and hallooed to him: "Look out, Honey, I am going to hand you quite a bundle" (70). The plaintiff knew he could not control

this number of cars, which were going to track No. 10, and going at the speed that they were, with the brake on one car (36). He had been previously advised, as the cut of cars moved to the eastward before they came to a stop, that the cars would go to track No. 10 in his care, the foreman remarking to him in their switchmen's idiom, "10 and the main line all the way," which meant that there would be certain cars go to track No. 10 in care of the plaintiff, and that the remainder of the cut of twenty-two cars, which were then coupled onto the switch engine, would be brought back to the main line for distribution. About three of the cars had passed over the switch when the signal was given to the engineer to reduce the speed of the cut, which was to be in charge of the plaintiff and go to track No. 10. Plaintiff heard the engine cease to exhaust. The slack began to run out of the cars with a creaking, jerking and chuckling noise and was noticed by foreman Carney, who was near the switch, and also by switchman Mulder, who was to the westward of the cut, twelve or fifteen car lengths from where the accident happened. The cut of cars moved some seven or eight car lengths after they had been slowed down and after the slack began to run out, before the plaintiff fell off of the west end of the west car. The foreman stated that this slowing down of the cut of cars, from four or five miles an hour to two or three miles an hour, was not an unusual

handling of them. Plaintiff seemed to realize that the speed of the cut was too great to be handled conveniently by him, and in anticipation of the cut slowing down, he left the center of the car, where he was standing on top of it, and moved toward the west end where the brake was. He heard the engine cease to exhaust and undoubtedly heard the slack begin to run out of the cars. He knew that when the engine ceased to exhaust it meant shutting off of power. After the slack ran out of the first car next to the engine, at the first reduction of speed, this slowing down was communicated to the second car, which in its turn allowed the slack to run out, and the third, fourth, fifth, etc., in turn. The plaintiff's experience and familiarity with the conditions apprised him of the fact that there was some cause for the slack running out of these cars. The slack would necessarily have run out of the ten or twelve cars between his cut of cars and the engine, after the engine slowed down, before the slowing down movement reached Ward's cut of ten cars. The running out of the slack in a cut of cars under these circumstances could only have been caused by some forced reduction of speed in the cars at the end opposite to Ward, such as by the use of the brakes on the engine, reducing its speed. Plaintiff was engaged in trying to turn the brake wheel of the brake with a brake stick when the slack finally reached the car on which he was standing, which

was the twenty-second car from the engine. When the slack reached this point, the cars were uncoupled by foreman Carney, as he got the rebound when the slack went out. The plaintiff testified this was the proper time at which to uncouple the cars and the only time they could be uncoupled. As the slack ran out of the cars, the knuckles were drawn taut and pressed against the coupling pin with such force that it could not be raised by the lever attached to it. If the cut of cars, on which Ward was at the time of the accident, had been uncoupled before the slack had run out on that portion of the cut, their speed would not have been reduced and Ward would have been left with a cut of cars going at a speed which he, himself, said and realized was too rapid for one man to control and which he, in his experience, knew would not be done under ordinary circumstances.

We insist then, from these conditions which have been recited in detail, that plaintiff Ward assumed the risk of this injury which he received, as one necessarily incident to the proper handling of the cars under the circumstances under which they were being handled. His qualifications, his age and experience, his intimate knowledge of the rules and practices generally on the Railroad Company, as well as of the Shawnee yards, will not enable him, in our judgment, to say that he did not know, as a matter of law, of these conditions.

We insist that he must, as a matter of law, have assumed the risk of these conditions of which he was fully aware; and that he knew and heard all such natural phenomena as others in similar conditions likewise heard, or he is presumed to have known and appreciated these things.

Chicago, Rock Island and Pacific R. R. Co. v. Houston (1878), 95 U. S. 697, 24 L. Ed. 542.

We, therefore, urge that upon the authority of the case of *Seaboard A. L. R. Co. v. Horton*, previously cited, and the numerous cases following this, that the trial court should have sustained the motion for a directed verdict upon the ground that the plaintiff assumed the risk of his injury as a matter of law, as necessarily incident to the usual and ordinary method of conducting the business of this defendant in these yards at this place and time.

(b) Plaintiff assumed the risk of injury as one resulting from the alleged negligence, which he knew, or which was so obvious as to be apparent to an ordinary man under such circumstances.

The plaintiff's theory throughout this case has been based upon the allegation that engine foreman Carney

was negligent in causing the switch engine to reduce its speed and that of the cut of cars to which it was coupled. It is set forth in the third paragraph of the petition. We requote at this point the portion of the third paragraph relating to the specific charge of negligence, for the convenience of the court:

“But plaintiff avers that the said engine foreman, the defendant A. J. Carney, and the defendant company, by and through the said foreman, negligently and in violation of their duty as aforesaid caused the engineer on the said engine to turn the throttle (thereby making the said engine cease to exhaust), and to apply the airbrakes to said engine, whereby the speed of said engine was retarded, so that the said engine ceased to shove said cars and began to move more slowly than the said cars were moving, with the result that said cars began to check up in speed violently one at the time, until finally the checking impulse reached the front car aforesaid just as plaintiff was stooping over as aforesaid to turn said brake, when said car was checked in motion so violently and so suddenly, that plaintiff was thrown over in front of said car to the ground between the tracks of said roadbed, a distance of about twelve feet; and plaintiff, being so near the moving car coming towards him, and being so wounded and stunned by the said fall, that he could not rise to his feet” (11).

The question is squarely raised, under the plaintiff's theory of the case, whether or not it was negligence to slow down the cut of cars, which plaintiff was to handle to track No. 10, from the speed of four or five miles an

hour, which he admits in his testimony was too great a speed or momentum to be controlled by one man using the brake, to two or three miles an hour.

We are unable to see upon what theory it can be contended that reducing the speed of this cut of cars, in order to enable this switchman to better control them, is negligence. If, however, it should be assumed for the sake of argument that it was negligence to reduce the speed of this cut of cars in this manner, we do not believe that the plaintiff can successfully deny that he is charged with knowledge of the fact that the cut was being slowed down when he heard the engine cease to exhaust and when others heard the creaking, chuckling and rattling of the cars as the slack was running out, and the additional fact that the slack must have run out of every other car in the cut of twenty-two before it reached plaintiff's car, which was the last car in the cut.

Northern Pacific R. Co. v. Freeman (1899),
174 U. S. 380, 43 L. Ed. 1014.

We shall discuss more fully, in another portion of the brief, the question of whether or not the jury was properly instructed with reference to the assumption of negligence of the master. We desire, at this point, to call the court's attention to the fact that the defendant excepted to an instruction given by the court on as-

sumption of risk, which wholly eliminated the alleged negligence on the part of the defendant.

The jury were not permitted, under the instructions of the court, to consider whether or not the plaintiff knew and appreciated the alleged negligence of the master and foreman Carney and assumed the risk of injuries, which resulted from the performance of his work under these conditions after knowledge and appreciation of the alleged negligent acts.

The plaintiff had had years of experience on The Chicago, Rock Island and Pacific Railway Company and other railroads, and knew and appreciated the rules governing switching generally on all the railroads on which he had worked and particularly in the Shawnee yards. He was a man of mature years and in full possession of his faculties. He knew what the foreman planned to do with the cut of cars upon which he was riding, for he had been with him at the time the cut was uncoupled from the remainder of the train and was told that "10 and the main line all the way" was to be the distribution of the cars. He understood the idiom to mean that certain cars were to be uncoupled from the rest and would be handled by him on the lead track to track No. 10, and the remainder of the cut would be brought back afterwards to the main line. He was warned, just after the cut began to be pushed onto the diagonal or lead track, that there would be an unusual

number given to him, the number having been mentioned to him in the previous statement. He was riding about midway on the top of the most distant car from the engine, when the engine began to push the cars onto the lead track. While standing there, after giving a signal to push the cars, he heard the engine cease to exhaust. He was not in a position to see any other lantern at the time and says he thought the cars were cut off from the engine, when the engine ceased to exhaust. He also testified that the proper time to uncouple the cut of cars was the moment the slack had run out. He knew that the slack had not run out of the cars, from his experience as a switchman, so long as the engine was pushing them. Immediately after the engine ceased to exhaust, the foreman heard the slack begin to run out of the cars, and another switchman, farther west than the car upon which the plaintiff was, also heard the creaking, chucking or rattling noise indicating the running out of the slack. Plaintiff must also have heard this because he was between these two employees. He knew that the running out of the slack meant the cars were still coupled to the engine. The foreman says the cars were going too fast for one man to control them and that it was the usual handling to reduce the speed to save property and be more easily handled.

If, then, he knew that the cars could not be uncoupled and have their speed reduced so long as they were being pushed, because the couplers were pressed against the pins and prevented it, and that they could not be uncoupled after the slack had run out and their speed reduced, because the cars were likewise pulling against the pin and prevented its being lifted, he would be aware that his car was not uncoupled from the remainder of the cut and would not be until the slack had reached it and the uncoupling had been made on the rebound, the only time, under his own testimony, at which the uncoupling could be made or would properly be made. He says he did not anticipate that the car upon which he was, when he undertook to tighten the brake, would throw him over. It was clearly obvious to all of the other employees that the engine had not been uncoupled from the cut of cars and that the slack was running out of the cut. In the face of these facts, we do not believe the plaintiff can say that he did not know these conditions and did not appreciate them, in view of his long experience as a switchman.

If the cars, which plaintiff was to handle, were going at too rapid a speed, as they started over the hump, to protect the property of the company and the safety of the employees, it was a fact which would be apparent to anyone who was an experienced switchman. The foreman says the speed of the cut was too great.

The plaintiff has not contradicted the statement. The plaintiff had a right to assume that the cars would be handled under the customary speed. This was a presumption against negligence upon which he might rely. *Chesapeake & O. Ry. Co. v. DeAtley* (1916), 241 U. S. 310, 60 L. Ed. —. The foreman testified that this was done and that the slowing down of the cut of cars was not negligence but was a precaution for safety of life and property.

We insist that the plaintiff's experience as a switchman would charge him with knowledge of this fact, which was obvious to any person familiar with the conditions in the yard, the methods of switching and the rules and regulations of the company generally.

When the engine ceased to exhaust the plaintiff was standing about midway on the top of the last car. He walked from this point to the brake wheel on the opposite end of the car, a distance of approximately twenty feet, and was engaged in tightening this brake when the slack ran out of this car and caused him to fall over the west end of it. As the cars were moving four or five miles an hour, there would, we insist, have been ample time for the plaintiff to have appreciated the fact that the slack was not being run out of a few of the cars but that it was running out of all the cars, and that the uncoupling of the cut of cars, which plaintiff was

handling, was to be made on the rebound after the slack had run out and that the cut was not to be separated from the remainder of the cars by a "kicking in" method, allowing the slack to run out of only a few of the cars. We insist that the plaintiff actually knew this because the slack was running out of the cars nearest the engine when he began to move from his position near the middle of the last car. After the slack on the last car had run out the foreman pulled the pin on the rebound and the jerk from slowing down the car reached it, as he reached the brake and began to tighten it. It must have been obvious to any person, in his position, that the slack was running out of the cars composing his cut before he began to tighten the brake. If everyone knew this, who heard the chucking and creaking noise which the slack made as it ran out, the plaintiff can be no exception and must be held to have known it. He cannot then say truthfully that he did not expect the slack to run out of the car upon which he was. If he does say so, he must contradict a conclusion which all reasonable men would arrive at under the same circumstances, with similar experience in that line of work. He must then simply be held to have misunderstood what was being done when the engine ceased to exhaust. He must then be said to have failed to appreciate some of the necessary and usual conditions incident to the proper and usual method of handling a

out of cars of this size under these conditions. No foreman, no engineer, no other employee can prevent the slack from running out of a cut of cars, when the engine, by ceasing to exhaust and reducing its speed, is reducing the speed of all of the cars in the cut before an uncoupling of any portion of them is made. The noise attendant upon the running out of the slack cannot be prevented. There is no more sure way of indicating to an experienced man, who handles cars, that the cars are still attached to the power which is propelling them and which has reduced its speed, than the noise of the slack running continuously toward the last car. If there had been but one or two cars in the cut, which plaintiff was to handle, we believe he might reasonably say that the running out of the slack, coming up to that last car or two, did not apprise him in time to warn him that the cars had not been uncoupled from those next to the engine; but in this case he had eleven cars. He had been warned of the number. He had been told the exact number. He had been told their destination. He knew every circumstance connected with the plan of handling the cars. He knew where they were going. He knew on what track they were going to reach the caboose, which was their destination.

Under the testimony that the cars were going too rapidly, when passing over the hump, to be properly controlled with reference to the safety of property and

employees, and that they should have been reduced and were reduced in the usual handling, the plaintiff cannot be relieved, in our judgment, from assuming the risk of these conditions and these circumstances by simply saying that he misunderstood the meaning of the engine's ceasing to exhaust.

These facts, we believe, will indicate the prominence in this case which the evidence gives to the question of the assumption of the risk of the handling of these cars in the manner in which they were handled. If, as the plaintiff contends, it was a negligent way of handling the cars, it was a way which was apparent to everybody who was in the vicinity and one which the plaintiff himself might have held to assume under the circumstances. The jury might have held, in passing upon this question of fact, that the plaintiff did or did not assume the risk of this failure to cut the cars, as alleged. The court removed from them the consideration of this feature of the case and prevented their consideration of the assumption of the alleged negligence of the master.

We insist that the motion for a directed verdict upon the ground that the plaintiff knew and appreciated the risks resulting from the alleged negligence or that the said risks were so apparent as to be obvious to all persons under similar circumstances, should have been

sustained upon the evidence presented. We think the trial court and the Supreme Court of Oklahoma erred in holding that this should not have been done and that their decision to this effect was a denial to these defendants of their rights under the Federal Employers' Liability Act.

II. The defendants were deprived of equal protection of the laws and due process of law by:

(a) The trial court in failing to instruct the jury to return a verdict for the defendants. (See 1.)

The full discussion of this subdivision of the argument has been previously made in the earlier portion of the brief under No. I, (a) and (b). We feel that it will not be advantageous to restate the argument made under that head. We refer the court to the other portions of the argument with the suggestion that we desire to incorporate that argument in the brief at this point and urge it in behalf of this proposition. We feel, upon the authority of the decisions and argument made under No. I, that the trial court should have directed a verdict in favor of the defendants. The failure of the trial court to so direct this verdict, we believe, was a denial of the guarantee of equal protection of the

laws and due process of law provided by the Fourteenth Amendment of the Constitution of the United States, and is sufficient ground for the issuance of the writ of certiorari applied for.

(b) The trial court in giving erroneous instructions on assumption of risk which were prejudicial.

“No. 3. You are instructed that it is admitted in this case that the relation of master and servant existed between the plaintiff and the defendant company in this case, and that therefore, as a matter of law, the company, and the defendant, A. J. Carney, as the servant of the defendant, owed the plaintiff the duty to use ordinary and reasonable care and prudence to protect the plaintiff from injury. You are therefore instructed that if you find, from a preponderance of the evidence in this case, that the manner in which you find from the evidence the cars of the defendant company were switched or handled by the defendant company, and the defendant, A. J. Carney, *amounted to negligence, under the circumstances of this particular case, and that as the proximate result of such negligence the plaintiff was injured, then you should return your verdict in favor of the plaintiff and against the defendants*” (207).

“No. 6. You are instructed that if you find from the evidence, by a preponderance thereof, that **it was the duty of the defendant Carney to cut or uncouple the cars, and then signal the engineer to stop, and if this was omitted or neglected by the**

defendant Carney, and that you further find from a preponderance of the evidence that such neglect or omission was the proximate cause of the plaintiff's injury, if you find the plaintiff was injured, then it is your duty to find for the plaintiff in such an amount as will compensate the plaintiff for the injury sustained, if any; unless you find from a fair preponderance of the evidence that the accident by which the plaintiff received his injury was caused by the plaintiff's own contributory negligence, and as you are hereinafter instructed, or that the risk was one of *the necessary and natural risks incident to plaintiff's employment*, as you are hereinafter instructed, in which event you should find for the defendants" (209).

"No. 7. You are instructed that even though you find that the defendant, Carney, was negligent, under the law as given to you in these instructions, yet if you find that the plaintiff was guilty of contributory negligence, or if you find that the risk in which he was injured, if you find that he was injured, was *one of the risks incident to his employment*, and that the plaintiff assumed same under his employment, you are instructed that your verdict must be for the defendant Carney and for the defendant Chicago, Rock Island & Pacific Railway Company" (209).

"No. 14. You are instructed that under the law *the plaintiff assumed the ordinary risks of the service of switchman*, so far as those risks at the time of his entering upon the employment were known to him, or were readily discernible by a person of his age and capacity in the exercise of ordinary care, whether the service of switchman was dangerous or not. And you are instructed that the ordinary risks of the business or the service of

switchman are those risks which are part of the natural and ordinary methods of conducting the business in switching cars in railroad yards" (212).

The last opinion of Mr. Justice Owen of the Supreme Court of Oklahoma admits that the instructions given by the trial court to the jury were erroneous so far as they dealt with assumption of risk. He, however, states in the opinion for the court that Sec. 6005, 1910 Revised Laws of Oklahoma, requires that the verdict of the jury should not be set aside unless "it appears that the error complained of has probably resulted in the miscarriage of justice." The portion of the opinion dealing with this question is as follows:

"The instructions complained of as to the assumption of risk, taken as a whole, are to the effect that the plaintiff assumed all the ordinary and usual risks and perils incident to the employment, whether they be dangerous or otherwise, and also all risks which he knew or should in the exercise of reasonable care, have known to exist. But in paragraph 11 appears the following language:

" 'He does not, however, assume such risks as are created by the master's negligence.'

"The servant does assume the risks incident to the master's negligence after he becomes aware of the same, or where the negligence and risk alike are so obvious that an ordinary prudent person under the circumstances would have observed and appreciated them. *C., R. I. & P. Ry. Co. v. Hughes, supra.* It was not a correct statement of the rule to instruct the jury without qualification that the

plaintiff did not assume such risks as were created by the master's negligence. It does not necessarily follow, however, that the case must be reversed for that reason. The negligence complained of was the failure to uncouple the cars and the sudden stopping with such force as to throw plaintiff from the top of the box car. If this was an unusual method of switching and amounted to negligence, in the nature of things, plaintiff could not have been aware of the negligence previous to the injury so as to have assumed the risk incident thereto. It was a question of fact, as has been said, to be determined by the jury whether this method of switching was usual or amounted to negligence. The jury was instructed that plaintiff could not recover unless this method amounted to negligence, or if it was a usual and ordinary risk of the employment. The jury must have found that it amounted to negligence and was not the usual method of switching and an ordinary risk. Therefore, the jury was not misled by the failure of the court to qualify the instruction that the plaintiff did assume the dangers incident to the master's negligence of which he was aware. Under Sec. 6005, R. L. 1910, we may not set aside the verdict for this reason unless, after an examination of the entire record, it appears that the error complained of has probably resulted in the miscarriage of justice" (337-338).

It seems clear that the decision is based upon and controlled by the Oklahoma statute relating to harmless error. The rule in the courts of the State of Oklahoma, with reference to the questions of assumption of risk and contributory negligence, is different from that of the United States courts. The Oklahoma Constitution provides, in Sec. 6, Art. 23, "The defense of contribu-

tory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." The decisions of the Supreme Court of the United States have repeatedly held that assumption of risk was not a question of fact in all cases and that the court was under obligation to pass upon the question as a matter of law in proper cases.

In the case of *Seaboard A. L. R. Co. v. Horton* (1914), 233 U. S. 492, 58 L. Ed. 1062, the trial court and the Supreme Court of the State of North Carolina undertook to determine the questions involved upon state statutes. This court held that the state laws, on the questions arising under the Federal Employers' Liability Act, were controlled by federal statutes and that the state laws were superseded. Mr. Justice Pitney, speaking for the court, said:

p. 499. "At the outset we observe that the judge evidently misapprehended the effect of the Federal act upon state legislation. Thus, the jury was told that plaintiff had brought the action under the Federal statute; 'And where Congress enacts a law within the limits of its power, that law should be enforced uniformly throughout the entire United States. If it is in conflict with the state law the state law is superseded, but where there is no conflict expressed by the statute of the United States, then the rule of the State prevails.' This, of course, in the absence of a specific statement of the applicable rule of the state law, might be treated as academic. But

the theory was carried into the specific instructions, to the extent that upon the questions of the employer's duty and the assumption of risk by the employee, the charge was modeled rather upon the North Carolina statute than upon the act of Congress."

p. 501. "In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress by the act of 1908, took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws upon the subject are superseded. Second Employers' Liability Cases, 223 U. S. 1, 55."

We insist that in this case the opinion of Mr. Justice Owen of the Supreme Court of Oklahoma has likewise followed the Constitution of the State of Oklahoma upon the defense of assumption of risk and the statute of the State of Oklahoma upon harmless error and that both are in conflict with the rule in force in the United States courts.

Under the evidence in the case, the defendants were in our judgment, entitled to the defense of assumption of risk as it existed at common law. It has been held by the Supreme Court of the United States, in the case of *Seaboard A. L. R. R. Co. v. Hertzel*, above cited, that this is available except where a federal statute required for the safety of employees, has been violated by the de-

fendant and that this defense of assumption of risk was assumption of risk as it was known at common law and not as it has been declared by constitution or state statute. It is said:

p. 503. "By the phrase 'any statute enacted for safety of employees,' Congress evidently intended Federal statutes, such as the Safety Appliance Acts, (March 2, 1893, c. 196, 27 Stat. 531; March 2, 1893, c. 976, 27 Stat. 943; April 14, 1910, c. 160, 36 Stat. 298; February 17, 1911, c. 103, 36 Stat. 913); and the Hours of Service Act (February 4, 1907, c. 2029, 34 Stat. 1415). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect subordinate to state control two of the essential factors that determine the responsibility of the employer.

"It seems to us that Sec. 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking Secs. 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a question upon the effect that is to be given to

contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible."

The testimony of witness, GEO S. MULDER, a safety appliance man, was to the effect that he found no defects on the car. His testimony was as follows:

"Q. Find anything wrong with the car or brake?

A. No, sir, I did not.

Q. Do you remember how high the brake was on that car?

A. No, sir, I don't. I didn't measure it, it was a safety appliance car.

Q. Yes, was the safety appliance on it?

A. Yes, sir. (80).

"Q. The examination you made of this car C56643, did you find the car in accordance with the Interstate Commerce Commission standard as to safety or not?

A. Well, I was not acquainted with that part of it. I had only been working out there a short time, my object in looking at the car was so I could report to my chief and let him inspect it.

Q. But you found nothing wrong with it in the examination you made?

A. No, sir, no, sir.

Q. You did not get up on the car?

A. Yes, sir; I did." (81.)

Car Inspector FRANK MARCH, who later examined the car, testified as follows:

“Q. Did you examine that car later?

A. I did.

Q. Did you find anything out of order with the car?

A. Not a thing.” (84)

“Q. Did you examine the car off of which Mr. Ward fell on the night of December 10, 1913?

A. Yes, sir.

Q. Was that a part of your duty?

A. Yes, sir. We have a report, make out an accident report.

Q. Was that a part of your duty to inspect these cars? (144)

A. Yes, sir.

Q. What was the condition of the car you found with reference to equipment, brakes and so forth?

A. They were in good condition.

Q. What was the distance of the rear brake above the car on the rear end of car No. 56643? I will ask you whether or not that brake stem was standard according to the Interstate Commerce Commission rule?

A. It was within their rule, yes, sir.

BY MR. PENDLETON: Objected to as incompetent, irrelevant and immaterial. No issue.

A. It covered the requirements.

BY THE COURT: If counsel cannot agree—

By Mr. PENDLETON: We do agree there is no question raised in (145) our petition and under their answer." (146)

We think it clear from this testimony and from the allegations of the petition referred to by counsel and found in the third paragraph of the petition (9-12), that there is no proof of any violation of "any statute enacted for the safety of employees" and that there was no allegation to that effect contained in the petition.

The instructions quoted in exact language at the beginning of this portion of the argument, we think are not in harmony with the law of the assumption of risk as declared by the Supreme Court of the United States, as shown in the following cases:

Texas & Pacific Ry. Co. v. Archibald, (1898), 170 U. S. 665, 42 L. Ed. 1188,

Choctaw, O. & G. R. Co. v. McDade, (1903), 191 U. S. 65, 48 L. Ed. 96,

Texas & P. R. Co. v. Swearingen, (1914), 196 U. S. 51, 49 L. Ed. 383,

Schlemmer v. Buffalo R. & P. R. Co., (1907), 205 U. S. 1, 51 L. Ed. 681,

Kreigh v. Westinghouse C. K. & Co., (1909), 214 U. S. 249, 53 L. Ed. 894,

Schlemmer v. Buffalo P. & R. Co., (1911), 220 U. S. 590, 55 L. Ed. 596,

Texas & P. R. Co. v. Harvey, (1913), 228 U. S. 319, 57 L. Ed. 852,

Southern Ry. Co. v. Crockett (1914), 234 U. S. 725, 58 L. Ed. 1564,

Yazoo & M. V. R. Co. v. Wright, (1914), 235 U. S. 376, 379, 59 L. Ed. 277,

Toledo, L. & W. Ry. Co. v. Slavin, (1915), 236 U. S. 454, 458, 59 L. Ed. 671,
Reese, Adm'x., v. Philadelphia & R. Ry. Co., (1915), 239 U. S. 463, 60 L. Ed. 384,
Jacobs v. Southern R. Co., (1916), 241 U. S. 229, 60 L. Ed. 970,
Chesapeake & O. R. Co. v. Proffitt, (1916), 241 U. S. 462, 60 L. Ed. 1102,
Chicago & N. W. R. Co. v. Bower, (1916), 241 U. S. 470, 60 L. Ed. 1107,
Boldt v. Penn. R. Co., (1918), 245 U. S. 441, 62 L. Ed. —.

The cases of *Texas & P. Ry. Co. v. Archibald*, *Choctaw, O. & G. R. Co. v. McDade*; and *Schlemmer v. Buffalo R. & P. R. Co.* arose prior to the date the Federal Employers' Liability Act became effective, namely, July 21, 1908, (35 Stat. at L. 65, Chap. 149, U. S. Comp. Laws 1916 Ann. 8657). The other cases cited above arose subsequent to the effective date of the act and are controlled by it. We believe they establish clearly the principle that the doctrine of assumption of risk is not controlled by state constitution or statutes and that it is materially different from the doctrine announced in the instructions above quoted. Instruction No. 3 given by the court, told the jury that if they found that the handling of the cars being switched "amounted to negligence, under the circumstances of this particular case, and that as the proximate result of such negligence the plaintiff was injured, then you should return your verdict in favor of the plaintiff and against the defendants."

In Instruction No. 6 the jury were told to find for the plaintiff if the injury was due to the defendant's negligence unless due to plaintiff's contributory negligence, "or that the risk was one of the necessary and natural risks incident to plaintiff's employment, as you are hereinafter instructed, in which event you should find for the defendants."

Instruction No. 7 advised the jury that the plaintiff could not recover if he was guilty of contributory negligence, "or if you find that the risk in which he was injured, if you find that he was injured, was one of the risks incident to his employment, and that the plaintiff assumed same under his employment."

Instruction No. 11 makes clear by a positive declaration that the plaintiff does not assume the risks of the master's negligence; and that the jury was instructed under the state statutes and constitution and not under the rules applicable to the federal statute. The instructions, as we will point out later in another part of the argument, were erroneous under the state rule as well as under the federal rule. The portion of instruction No. 11 dealing with this particular declaration is as follows:

"You are further instructed that while a servant does not assume the extraordinary and unusual risks of the employment yet on accepting employment he does assume all the ordinary and usual

risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. *He does not, however, assume such risks as are created by the master's negligence nor such as are latent, or are only discoverable at the time of the injury.* The doctrine of an assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment." (210-211)

Instruction No. 14 advises the jury that "the plaintiff assumed the ordinary risks of the service of switchman, so far as those risks at the time of his entering upon the employment were known to him, or were readily discernible by a person of his age and capacity in the exercise of ordinary care, whether the service of switchman was dangerous or not," thus limiting the doctrine of assumption of risk to the ordinary risks of the service of switchman and excluding any defense upon the assumption of risk of injury as a result of the master's negligence. It seems clear to us that there was prejudicial error in these erroneous instructions. Mr. Justice Owen of the Supreme Court of Oklahoma admits that the instructions are erroneous. We insist that there was prejudicial error because the instructions dealt with one of the principal defenses urged by the defendants as a bar to plaintiff's right of recovery. They dealt with the defense erroneously and if followed by the jury, eliminated any possibility of the assumption

of the risk of any injuries by the plaintiff, which might have been traceable to any negligence of the defendants under the proof. We cannot convince ourselves that where a principle of law, relied upon as a defense in an action, is so material to the decision of the issues of a case, that it is not prejudicial to erroneously instruct the jury upon that principle of law, eliminating from their consideration entirely one phase of that principle, as announced repeatedly by the decisions of the Supreme Court of the United States.

Mr. Justice Van Devanter discussed the identical proposition upon which we are relying in the case of *Missouri, K. & T. Ry. Co. v. Wilhoit*, (C. C. A. 8th C. 1908), 160 Fed. 440. In that case the plaintiff was injured on a handcar and the defense of the assumption of the risk of his injuries was pleaded in bar of his right of recovery. The court said:

p. 444. “At the request of the plaintiff, and over the objection and exception of the defendant, the court, without any qualification thereof, incorporated the following in its charge:

‘Plaintiff had a right to rest on the assumption that the hand car in question was free from defects discoverable by proper inspection;’ and also: ‘He had a right to assume that the defendant had used reasonable care to furnish a safe hand car, and to deal with the hand car relying on the fact that it was safe.’

“This portion of the charge was properly subject to objection, for it so stated and repeated the primary rule before mentioned as to convey the impression that it was absolute, and not subject to any exception; and this in a case where there was evidence tending persuasively to show that it fell within the exception to the rule, and where the defendant in various ways indicated that it was relying upon the exception. In other words, it left out of view, and was well calculated to cause the jury to disregard, important evidence which it was their duty to consider in forming their verdict. *Smith v. Condry*, 1 How. 28, 35, 11 L. Ed. 35; *Rhett v. Poe*, 2 How. 457, 483, 11 L. Ed. 338; *Adams v. Roberts*, 2 How. 486, 496, 11 L. Ed. 349; *Ranney v. Barlow*, 112 U. S. 207, 215, 5 Sup. Ct. 104, 28 L. Ed. 662. And the objection was not merely that there was a failure to instruct upon a particular point, but that, in view of the evidence to be considered there was a prejudicial misdirection. *Hickory v. United States*, 151 U. S. 303, 316, 317, 14 Sup. Ct. 334, 38 L. Ed. 170; *Ranney v. Barlow, supra.*”

This is in harmony with the doctrine that has been announced as a rule by the Supreme Court of the United States in the following decisions:

District of Columbia v. McElligott, (1886), 117 U. S. 621, 29 L. Ed. 946,
Kane v. Nor. Central R. Co. (1888), 128 U. S. 91, 32 L. Ed. 339,
Jones v. East Tennessee, V. & G. R. Co., (1888), 128 U. S. 443, 32 L. Ed. 478,
Seaboard A. L. R. Co. v. Horton, (1914), 223 U. S. 492, 58 L. Ed. 1062,
Toledo, St. L. & W. R. Co. v. Slavin, (1915), 236 U. S. 454, 59 L. Ed. 671.

We insist that the instructions above quoted, given

to the jury, did not correctly state the law with reference to the assumption of risk; that the harmless error doctrine of the Oklahoma statute is inapplicable to this question and not determinative of it; that the defendants were entitled to the *correct* statement of the doctrine of assumption of risk as it existed at common law; that the Supreme Court of the United States has held that such erroneous instructions are prejudicial; and that this case comes within the language of Mr. Justice Van Devanter in the Wilhoit Case, above quoted; to the effect that the objection is "not merely that there was a failure to instruct upon a particular point, but that, in view of the evidence to be considered, there was a prejudicial misdirection."

(e) The Supreme Court in affirming the judgment of the trial court and holding the admitted errors harmless relating to:

Assumption of risk as a matter of law.

Under the Oklahoma decisions.

The Supreme Court of Oklahoma, in the last opinion by Mr. Justice Owen, admits the error in the instructions on assumption of risk in the following quotation, which is re-quoted for convenience:

“The instructions complained of as to the assumption of risk, taken as a whole, are to the effect that the plaintiff assumed all the ordinary and usual risks and perils incident to the employment, whether they be dangerous or otherwise, and also all risks which he knew or should in the exercise of reasonable care, have known to exist. But in paragraph 11 appears the following language:

‘He does not, however, assume such risks as are created by the master’s negligence.’

The servant does assume the risks incident to the master’s negligence after he becomes aware of the same, or where the negligence and risk alike are so obvious that an ordinary prudent person under the circumstances would have observed and appreciated them. *C. R. I. & P. Ry. Co. v. Hughes, supra.* It was not a correct statement of the rule to instruct the jury without qualification that plaintiff did not assume such risks as were created by the master’s negligence. It does not necessarily follow, however, that the case must be reversed for that reason. The negligence complained of was the failure to uncouple the cars and the sudden stopping with such force as to throw plaintiff from the top of the box car. If this was an unusual method of switching and amounted to negligence, in the nature of things, plaintiff could not have been aware of the negligence previous to the injury so as to have assumed the risk incident thereto. It was a question of fact, as has been said, to be determined by the jury whether this method of switching was usual or amounted to negligence. The jury was instructed that plaintiff could not recover unless this method amounted to negligence, or if it was a usual and ordinary risk of the employment. The jury must have found that it amounted to negligence and was not the usual method of switching and an ordi-

nary risk. Therefore, the jury was not misled by the failure of the court to qualify the instruction that the plaintiff did assume the dangers incident to the master's negligence of which he was aware. Under Sec. 6005, R. L. 1910, we may not set aside the verdict for this reason unless, after an examination of the entire record, it appears that the error complained of has probably resulted in the miscarriage of justice." (337-338)

The statement of the doctrine of assumption of risk, in the language used by the trial court in the instruction quoted at another place in the argument, is erroneous, under the case of *Osage Coal & Mining Co. v. Sperra*, (1914), 42 Okla. 726, 142 Pac. 1040. It will be noted this case was decided about four years prior to the date of the last opinion by Mr. Justice Owen, but is not cited by him. We quote a part of the opinion for the convenience of the court. It is said:

p. 732. "In the same case it is also held:

"Assumption of risk" is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk.'

The defendant was not absolutely and unqualifiedly bound to furnish, and absolutely and unqualifiedly liable for failure to furnish, plaintiff a reasonably safe place in which to work, and reasonably safe tools and appliances with which to work; but the defendant's duty to do so was subject to the qualification that the plaintiff could assume the

usual, ordinary, and known risks arising from its failure to do so, and a jury, if correctly instructed, would be expected to find that he did assume such risks as were usual, ordinary, and known to be incident to the discharge of his duties in the employment in which he was injured, *although these risks may have resulted from what would otherwise have been actionable negligence on the part of defendant.*

*That it was error for the trial court to instruct the jury in effect that the plaintiff could not assume the risk of the want of a reasonably safe place in which to work, especially so in view of his failure to instruct that assumption of risk was a question of fact which must be left to the jury, seems too clear to require either argument or further citation of authorities; but that a servant may assume such risks, and that the presumed knowledge or ignorance of the servant is the essential basis by which he is charged with the acceptance of one class of risks incident to his employment, and the non-acceptance of another class, will appear from an examination of the following authorities: 3 Labatt on Master and Servant (2d Ed.) secs. 897 and 1181; 4 Thompson on Negligence, (2d Ed.) 625, 627, and 628; *Dewey Portland Cement Co. v. Blunt*, 38 Okla. 182, 132 Pac. 659; *Coalgate Co. v. Hurst*, 25 Okla. 588, 107 Pac. 657; *San Bois Coal Co. v. Janeway*, 22 Okla. 425, 99 Pac. 153; *Needey v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145; *Milby & Dow Coal & Mining Co. v. Balla*, 7 Ind. T. 629, 104 S. W. 860, 18 L. R. A. (N. S.) 695; *Atoka Coal & Mining Co. v. Miller*, 7 Ind. T. 104, 104 S. W. 555; *Choctaw O. & G. R. Co. v. O'Nesky*, 6 Ind. T. 180, 90 S. W. 300; *Schellin v. North Alaska Salmon Co.* (Cal.) 138 Pac. 723; *Missouri, K. & T. Ry. Co. v. Wilhoit*, 160 Fed. 440, 87 C. C. A. 401; *Bradburn v. Wabash R. Co.*, 134 Mich. 575, 96 N. W. 929; *Bengston v. Chicago, St. P., M. &**

O. R. Co., 47 Minn. 486, 50 N. W. 531; *Forbes v. Boone Val. Coal & Ry. Co.*, 113 Iowa, 94, 84 N. W. 970; *Atchison, T. & S. F. Ry. Co. v. Schroeder*, 47 Kan. 315, 27 Pac. 965; *Roth v. Northern Pac. Lumbering Co.*, 18 Ore. 205, 22 Pac. 842; *Wood v. Heiges*, 83 Md. 257, 34 Atl. 872; *Brossman v. Lehigh Val. R. Co.*, 113 Pa. 490, 6 Atl. 226, 57 Am. Rep. 479; *Little Rock & Ft. S. R. Co. v. Duffey*, 35 Ark. 602; *Sanderson v. Panther Lbr. Co.*, 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 88 Am. St. Rep. 841."

Mr. Justice Owen in his opinion cited the case of *Chicago, R. I. & P. Ry. Co. v. Hughes*, as shown in the above quotation. In this case the plaintiff was a fireman, who received injuries while firing an engine. He alleged that his injuries were due to a defective condition of the engine and to the slippery condition of the floor of the engine cab and the defective water tank, which leaked. The same trial court tried the Hughes Case which tried the case now under consideration. Judge Pitman, of the Superior Court of Pottawatomie County, Oklahoma, gave to the jury in the Hughes case and this case an instruction on assumption of risk, which was almost identical. In order to make the comparison clear, we quote in parallel columns the instructions given in the two cases. It was numbered 10 in the Hughes case and No. 11 in the Ward case. The portions of instruction No. 11 in the Ward case, which are italicized, are not found in instruction No. 10 given in the Hughes case. They do not in any way modify the

statement which is identical in both the instructions, namely: "*He does not, however, assume such risks as are created by the master's negligence.*" The instructions are as follows:

"No. 11. You are *further* instructed that while a servant does not assume the extraordinary and unusual risks of the employment yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the (210) master's negligence *nor such as are latent, or are only discoverable at the time of the injury.* The doctrine of an assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knew, or in the exercise of reasonable and ordinary care should know the risk to which he is exposed, he will, as a rule, be held to have as-

"No. 10. You are instructed that while a servant does not assume the extraordinary and unusual risks of the employment, yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows, or should in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the master's negligence. The doctrine of assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knows, or in the exercise of reasonable and ordinary care, should know the risks to which he is exposed, he will, as a rule, be held to have assumed them; but where he either does not know or knowing, does not appreciate

sumed them; but where he either does not know, or knowing, does not appreciate such risk, and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries.” (211)

such risk, and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injury.” (249)

In discussing this instruction No. 10 in the Hughes case, Mr. Justice Hardy of the Supreme Court of Oklahoma, refers to it by number and holds that the instruction was erroneous as a statement of the doctrine of assumption of risk and was prejudicial because it removed from the consideration of the jury all reference to the master's negligence and the assumption of any condition as a result of the negligence of the master or fellow servants. The portion of the opinion in the Hughes case, dealing with this instruction, is as follows:

p. 415. “In instruction No. 10, submitting the defense of assumption of risk, the court told the jury that a servant did not assume such risks as were created by the master's negligence. Exception was saved to this instruction, and defendant requested the court to charge the jury that, in entering defendant's employment, plaintiff assumed the hazard necessarily incident thereto, and also assumed the hazard as to all conditions which

were open, obvious, and patent, and which were known to him, or by the exercise of reasonable care could have been ascertained by him. *The rule that the servant never assumes the risk of the negligence of the master is not recognized in the federal courts.* *Burke v. Union Coal & Coke Co.*, 157 Fed. 178, 84 C. C. A. 626; *C., O. & G. R. Co. v. McDade*, 191 U. S. 64, 24, Sup. Ct. 24, 48 L. Ed. 96. The true rule in that regard in the courts of the United States is that the servant assumes all the ordinary risks of his employment which are known to him, or which could have been known with the exercise of ordinary care to a person of reasonable prudence and diligence under like circumstances; and with reference to risks not naturally incident to the occupation, but which may arise out of the failure of the master to exercise due care in providing a reasonably safe place in which to work and reasonably safe appliances with which to work, the rule is that the servant does not assume such risks until he becomes aware of the defect or improper construction in the place or appliances furnished to him, and of the risks arising therefrom, unless such defect and risk are so patent and obvious that an ordinarily careful person would observe the one and appreciate the other. *Texas & P. Ry. Co. v. Harvey*, 228 U. S. 319, 33 Sup. Ct. 518, 57 L. Ed. 852; *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 34, Sup. Ct. 229, 58 L. Ed. 521; *Seaboard Airline R. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1063, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *Chesapeake & O. R. Co. v. DeAtley*, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016. And the same rule has been announced repeatedly by this court. *Osage Coal & Min. Co. v. Sperra*, 42 Okla. 762, 142 Pac. 1040; *Dewey Portland Cement Co. v. Blunt*, 38 Okla. 182, 132 Pac. 659; *M., O. & G. Ry. Co. v. Overmyre*, 160 Pac. 933.

When the court instructed the jury that the servant did not assume risks created by the master's negligence, *he withdrew from consideration by them the defense as to such risks.* The plaintiff's petition alleged that it was the duty of defendant to keep the engine in a proper and reasonable state of repair, so that same could be easily and safely manipulated by plaintiff, and that said defective condition had been reported to defendant, but that defendant carelessly and negligently failed to make such repairs. All of the evidence offered by plaintiff as to the cause of the injuries tended to sustain these allegations as to negligence upon the part of the defendant, and *the instruction in question practically deprived defendant of any defense to said alleged acts of negligence on the theory that plaintiff had not assumed such risks.*"

It seems clear to us that the opinion of the court, affirming the judgment in this case, is in conflict with the decision of the court in the Hughes case. It will be noted, by a reference to Mr. Justice Owen's opinion, that only one case of the Supreme Court of the United States was cited in it, that one being the case of *Seaboard A. L. R. Co. v. Horton* (1914), 233 U. S. 492, 58 L. Ed. 1062, L. R. A. 1915C, 1 Ann. Cas. 1915B 475. He cites in support of the court's decision on the question of assumption of risk, the cases of *Chicago, R. I. & P. Ry. Co. v. Hughes*, just referred to; *M. O. & G. Ry. Co. v. Overmyre*, (Okla. 1917), 160 Pac. 933; *Devine v. Chicago, R. I. & P. Ry. Co.*, 266 Ill. 248, 107 N. E.

595, Ann. Cas. 1916B 481, besides the case of *Seaboard Airline R. Co. v. Horton* just mentioned.

The case of *M. O. & G. Ry. Co. v. Overmyre*, just referred to, was an action brought *under the state statute* of Oklahoma. No proof being made of interstate commerce at the time of the accident, it can, of course, be no authority for any interpretation of the Federal Employers' Liability Act, or instructions in a case tried under it.

The case of *Devine v. Chicago, R. I. & P. Ry. Co.*, just referred to, was brought under the Federal Employers' Liability Act. The contention made in the Supreme Court of Illinois was that "the court erred in refusing to direct a verdict for it *because there was no competent evidence* that the particular service in which the deceased was engaged at the time he was killed was *interstate commerce*," and also "that there was *no evidence* in the record *from which the negligence* of the engineer can be *reasonably inferred*."

It will be noted that the two questions raised in this case, (1) whether or not there was proof of interstate commerce, and (2) whether or not there was evidence of negligence on the part of the engineer, in no way deals with the question of assumption of risk and cannot be an authority in support of any instructions upon it. Moreover, any statements contained in the

case would be merely persuasive, as it is in a court, whose decisions are not binding upon the Supreme Court of the United States. We have cited the case of *Seaboard Airline Ry. Co. v. Horton*, (1914), 233 U. S. 492, 58 L. Ed. 1062, many times in this brief and believe that its holding is not only *not* in accord with that of the court in the opinion of Mr. Justice Owen, but that it is *directly contrary* to it on the question of assumption of risk and that its holding, reversing the trial court, is a decision in favor of the defendants herein and shows the holding of the Supreme Court of Oklahoma to have been erroneous and prejudicial.

The rule laid down by Mr. Justice Hardy of the Oklahoma Supreme Court in the Hughes case, quoted from, is not a new one but one which has long been in force in the state, as announced by the decisions during territorial days and since statehood. This is shown by the following cases:

City of Guthrie v. Swan (1895), 3 Okla. 116, 41 Pac. 84.

Oklahoma City Railway Co. v. Barkett, (1911), 30 Okla. 28, 118 Pac. 350,

Oklahoma City Railway Co. v. Diab (1911), 30 Okla. 32, 118 Pac. 351.

St. Louis & S. F. R. Co. v. Kral, (1912), 31 Okla. 624, 122 Pac. 177.

Muskogee Electric Traction Co. v. Staggs, (1912), 34 Okla. 161, 125 Pac. 481,

Metropolitan Ry. Co. v. Fonville (1912), 36 Okla. 76, 125 Pac. 1125,

St. Louis & S. F. R. Co. v. Elsing, (1913), 37 Okla. 333, 132 Pac. 483,
Chicago, R. I. & P. Ry. Co. v. Pitchford,
(1914), 44 Okla. 197, 143 Pac. 1146.

In the last two cases the Supreme Court of Oklahoma announced the rule that the misdirection of the court to the jury was prejudicial and sufficient ground for a reversal of the case. In *St. Louis & S. F. R. Co. v. Elsing*, it was said:

p. 339. "We are therefore inevitably forced to the conclusion (as we were in *Haley-Ola Coal Company v. Morgan*, 133 Pac. —, (not yet officially reported) that the giving of the instruction complained of was error and of such magnitude as will necessitate the reversal of the case. We cannot apply the so-called doctrine of harmless error in order to make this judgment stand, as urged by counsel, for here a substantial right has been denied defendant, and for the further reason that *that greatly overworked doctrine is seldom, if ever, applied to conflicting instructions on a material point for the all-sufficient reason that the court cannot say whether the jury followed the correct or the incorrect instruction. Pulaski Coal Co. v. Gibboney, etc.*, 110 Va. 444, 66 S. E. 73."

In *Chicago, R. I. & P. Ry. Co. v. Pitchford*, above referred to, the court first affirmed the case but upon rehearing discussed the giving of erroneous instructions and used the following language:

p. 211. "*The mistake here, however, is one of misdirection, in that the court erroneously charged what the issues were, as made by the evidence,*

which necessarily misled the jury as to what they were to determine. It in effect took from the jury the defense of contributory negligence, as it told them that if they found defendant did one of two things, while plaintiff was getting off the coach, and was thereby injured, they should find for the plaintiff, without regard to whether the plaintiff by her own negligence directly contributed to the accident or not. This was palpable error. *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Denver Tramway Co. v. Lassasso*, 22 Colo. 444, 45 Pac. 409; *Chicago, B. & Q. R. Co. v. Housh*, 12 Ill. App. 88; *Knickerbocker Ice Co. v. DeHaas*, 37 Ill. App. 195; *Cole v. Searfoss*, 49 Ind. App. 344, 97 N. E. 345; *Murphy v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 539; *McCormick v. Chicago, R. I. & P. Ry. Co.*, 47 Iowa, 346; *St. Louis S. W. R. Co. v. Samuels*, 103 Tex. 54, 123 S. W. 121."

Under Federal Decisions.

The holding of the court is clearly antagonistic to the position of the Supreme Court of the United States, as we interpret the following cases:

Schlemmer v. Buffalo P. & R. Co., (1911), 220 U. S. 590, 55 L. Ed. 596,
Gila Valley, G. & N. R. Co. v. Hall, (1914), 232 U. S. 94, 58 L. Ed. 521,
Toledo, L. & W. Ry. Co. v. Slavin, (1915), 236 U. S. 454, 458, 59 L. Ed. 671,
Chesapeake & O. R. Co. v. Proffitt, (1916), 241 U. S. 462, 60 L. Ed. 1103.
Boldt, Adm'x. v. Penn. R. Co., (1918), 245 U. S. 441, 62 L. Ed. —.

We feel it unnecessary to quote from the decisions,

above cited, because of the very full and numerous quotations made at other places in this brief touching on the same question. It seems clear to us, from the facts, that the opinion of Mr. Justice Owen was not supported by the Horton case, the only United States Supreme Court case cited in it nor by the opinion of *Chicago, R. I. & P. Ry. Co. v. Hughes*, in which case the trial court gave the portion of the instruction complained of in the same language and that the other two cases cited were not in point because *M. O. & G. Ry. Co. v. Overmyre* was not brought under the Federal Employers' Liability Act, and *Chicago, R. I. & P. Ry. Co. v. Devine* because it did not deal with the question of assumption of risk. We feel sure that the opinion cannot be defended upon the Oklahoma decisions and that from the standard of the Federal decisions cited, it was both erroneous and prejudicial and the judgment should have been reversed.

Assumption of Risk to Be a Question of Fact.

If the court should be of the opinion that the record in this case raised a question of fact, which should be decided by the jury, we are of the opinion that the defendants were prejudiced by the trial court and deprived of Federal rights guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that the question of fact was submitted to the jury

under erroneous instructions upon the defense of assumption of risk. We believe the following cases show that instructions given by the court, Nos. 3 (207), 6 (209), 7 (209), 14 (212), quoted under No. II (b) herein, were erroneous according to the statement of the doctrine of assumption of risk by the United States Supreme Court:

Schlemmer v. Buffalo P. & R. Co., (1911), 220 U. S. 590, 55 L. Ed. 596,
Gila Valley, G. & N. R. Co. v. Hall, (1914), 232 U. S. 94, 58 L. Ed. 521,
Toledo, L. & W. Ry. Co. v. Slavin, (1915), 236 U. S. 454, 458, 59 L. Ed. 671,
Chesapeake & O. R. Co. v. Proffit, (1916), 241 U. S. 462, 60 L. Ed. 1103,
Boldt, Adm'x. v. Penn. R. Co., (1918), 245 U. S. 441, 62 L. Ed. —.

The facts in the record show that plaintiff Ward was an experienced switchman, of mature age, and that he knew and was acquainted with the rules in force on the defendant's railroad, covering switching and that he knew and appreciated the methods which were in use in doing the kind of work in which he was engaged at the time of the accident in the Shawnee yards; that the handling of the cut of cars involved in the accident was usual and ordinary (64, 118, 121, 140). As this cut of cars began to move on the diagonal or lead track, the plaintiff was warned by the foreman to look out that he was going to hand him quite a bundle.

The switch was then thrown and the cars pushed in a southwesterly direction on the lead track. The plaintiff was standing on the middle of the last car, the one from which he fell. He had transmitted the signal to start the movement of the cars and heard the engine exhausting. When he heard the engine cease to exhaust he began to move from the center of the car on which he was toward the brake wheel to tighten the brake (36). The slack had run out of the cars between him and the engine gradually (114), with the customary noise (80, 116, 140). The plaintiff stated that there was no customary speed at which the cars were handled in the yards (67) and that the speed of the cars prior to the accident was not nearly so rapid as he had seen (67). It had been reduced from four or five miles an hour, the speed which the cars had attained as they approached and passed over the hump, to between two and five miles an hour, the speed at which they were moving at the time of the accident (67-68). The foreman stated that the speed at which the cars were being moved, before they were slowed down, was the customary speed in pushing them over the hump (113). The speed at the time of the accident was not sufficient to jerk the plaintiff's lantern off the top of the car. It was found on the car by Inspector G. S. Mulder near the running board, lying on its side (80).

The plaintiff knew that the cut of cars, which he was to handle and which were going to track No. 10, were to be uncoupled from the other portion nearest the engine. He knew from his experience that the cars could not be uncoupled except on the rebound (45). When the engine slowed down, the slack began to run out of the cars. It ran out of the car next to the engine first, then the second one from the engine, and etc., until it reached the last car. The cars could not be uncoupled if their speed was reduced as they were being pushed forward, because the engine kept them pushed tightly against one another and prevented the lifting of the pin. They could not be uncoupled after the slack had run out because the cars were pulling against the pin too tightly to permit its being lifted. They could only be uncoupled the instant after the slack had run out, when the rebound came (117, 120). The noise of the slack running out of the cars was noticeable and could have been easily discerned by a man accustomed to handling cars in this manner (116, 140). When the engine ceased to exhaust, which the plaintiff heard, he undoubtedly heard the slack begin to run out of the cars nearest the engine. As the noise continued, it must have been evident to him that the cars were still attached to the engine and that the speed was being reduced. These facts were so obvious that they were apparent to anyone acquainted with the methods

of switching and who could hear the movements of the engine and cars.

The plaintiff then moved from his position in the middle of the car, to the brake wheel on the opposite end of the car and undertook to tighten the brake in order to reduce the speed of the cut of cars he was handling. He did not wait for the slack to reach his car before he did this, although he knew that the cars could not be uncoupled except upon the rebound, after the slack had run out (45). If, then, it was negligence for the foreman, as a servant of the railroad company, to reduce the speed of the cars and wait until the slack had run out and uncouple them upon the rebound, these facts must have been known to plaintiff Ward because they were so obvious that any person in that vicinity, familiar with the methods of switching, would have known them. Questions of fact, in connection with the defense of assumption of risk, were certainly raised, if the contention of the plaintiff is good, that the method of handling the cars was negligence.

We think it is only fair to say that among the questions which might be raised with reference to the situation at the time of the accident, are the following:

“Whether it was negligence on Carney’s part, after warning Ward, to slow the cut of cars down so they could be more easily handled by Ward.

Whether Ward did not assume the risk of his failure to recognize the change in speed and in the manner of handling the cars, as a result of the slack running out of the cars between the car on which he was and the engine, which was coupled onto the other end of the cut.

Whether Ward did not assume the risk of his failure to anticipate the change in the handling of the cars, because of the unusual number of them, after receiving the warning from the foreman.

Whether Ward did not assume the risk of his failure to anticipate the handling of this cut of cars at the speed at which it was handled, in view of the fact that there was no certain speed at which the cars were handled, and that any speed might be anticipated by him in the yard, and

Whether, if he did fail to anticipate the cars being given to him at the speed at which they were moving, when uncoupled by the foreman, and failed to heed the chucking noise following the ceasing of the exhaust of the engine, which rattling or chucking noise he knew meant the running out of the slack in the cut, and failed to note the significance of the reduced speed of the cars in the cut and failed to act upon the warning which he had been given, and these other facts which were so obvious as to be apparent to anyone, whether in view of all these facts he did not assume the risk of the negligent handling of the cars in this manner."

These, we insist, are questions of fact which are related directly to the defense of assumption of risk and which were undoubtedly not properly considered by the

jury, because they were instructed erroneously with reference to the defense of assumption of risk.

In the case of *Schlemmer v. Buffalo, P. & R. Co.* (1911), 220 U. S. 590, 55 L. Ed. 596, Mr. Justice Day, speaking for the Court, said:

p. 596. "In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects. *Choctaw, Oklahoma, Etc. R. R. Co. v. McDade*, 191 U. S. 64, 67, 68, and former cases in this court therein cited."

We insist that the trial court deprived the defendants herein of substantial rights in failing to properly instruct the jury upon the question of assumption of risk, if, as is contended, there was a question of fact for the jury to decide, relating to this defense. We think, as was said by Mr. Justice Van Devanter in the case of *Missouri, K. & T. Ry. Co. v. Wilhoit* (C. C. A. 8th C. 1908), 160 Fed. 440, 445, that this was "a prejudicial misdirection."

Contributory Negligence.

In discussing the instructions on contributory negligence, Mr. Justice Owen of the Supreme Court of Oklahoma, says:

“Under the second assignment plaintiffs in error complain of the instructions dealing with the assumption of risk and contributory negligence. As to contributory negligence, the jury was instructed the plaintiff could not recover if his negligence contributed to the injury. *This was not a correct statement of the law*, but the error is one of which defendant cannot complain. Under the Federal Employers’ Liability Act contributory negligence goes only in mitigation or to reduce the damage. It is a comparative defense and not a defense in bar.” (337.)

Instruction No. 3 relating to contributory negligence is as follows:

“You are instructed that it is admitted in this case that the relation of master and servant existed between the plaintiff and the defendant company in this case, and that therefore, as a matter of law the company, and the defendant, A. J. Carney as the servant of the defendant, owed the plaintiff the duty to use ordinary and reasonable care and prudence to protect the plaintiff from injury. You are therefore instructed that if you find, from a preponderance of the evidence in this case that *the manner in which you find from the evidence the cars of the defendant company were switched or handled by the defendant company, and the defendant, A. J. Carney, amounted to negligence, under the circumstances of this particular case*, and that

as the proximate result of such negligence the plaintiff was injured, then you should return your verdict in favor of the plaintiff and against the defendants." (207.)

It will be noted that the latter portion of this instruction advises the jury that they may allow recovery to the plaintiff if they find that the method used in switching the cars was negligent and that the plaintiff was injured as a proximate result thereof. No reference is made to the contributory negligence of the plaintiff nor that it must be taken into consideration nor that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." It is apparent from this that the instruction is based upon the State Constitution and Statutes of Oklahoma.

Instruction No. 5 also discusses contributory negligence in the following language:

"You are further instructed that the defendant, under its plea of contributory negligence, has introduced evidence for the purpose of showing that from the circumstances and facts following the giving of the 'easy signal' testified to by the witnesses in this case, there followed certain noises and occurrences by which the plaintiff, in the exercise of ordinary care for his own safety, could or should have known that the slack was being taken up in the cars in question, and further that in the use of ordinary care for his own safety in the light of all the attendant facts and circumstances,

the plaintiff was guilty of contributory negligence in placing himself where he did at the time of the injury, and that such negligence contributed to his injuries, if any. And you are instructed in this connection that if you believe from a preponderance of the evidence that the plaintiff's own negligence proximately contributed to his injury, then the law is that *even though you should find the defendant was guilty of negligence in the manner of handling said cars, the plaintiff cannot recover*, and your verdict should be for the defendants." (208.)

The latter part of this instruction, in which contributory negligence is stated to be a bar, is evidence that the court was instructed under the Constitution of Oklahoma and the State Statutes.

Instruction No. 7 is as follows:

"You are instructed that even though you find that the defendant, Carney, was negligent, under the law as given to you in these instructions, yet if you find that the plaintiff was guilty of contributory negligence, or if you find that the risk in which he was injured, if you find that he was injured, was one of the risks incident to his employment, and that the plaintiff assumed same under his employment, you are instructed that your verdict must be for the defendant Carney, and for the defendant, Chicago, Rock Island & Pacific Railway Company." (209.)

This follows the point of view expressed in instruction No. 5, above quoted, and is clearly based upon State law.

Instruction No. 12 refers to contributory negligence and assumption of risk as being "*always questions of fact to be determined by the jury.*" The language in the instructions is as follows:

"You are instructed that contributory negligence is negligence of the plaintiff, or of a person on account of whose injury the action is brought, amounting to a want of ordinary care, and proximately contributing to bring about the injury. In order to constitute such negligence as will bar a recovery of damages, two elements must concur: First, a want of ordinary care on the part of the plaintiff; second, a proximate connection between this want of ordinary care and the injury complained of, and *these are always questions of fact to be determined by the jury.* The question is, has the care, diligence, or skill demanded by the peculiar circumstances of the particular case been exercised? If so, there is no negligence. If not, there is negligence. The plaintiff was not negligent if he exercised reasonable care. He was negligent if he failed to do so. His conduct is to be estimated by what a reasonably prudent man would have done under the circumstances." (211)

It is clear from this that the court is instructing the jury under the Oklahoma Constitution and Statutes. We believe these instructions, as the court in his opinion admits, are "not a correct statement of the law." We base this upon the following cases of the Supreme Court of the United States:

Norfolk & W. R. Co. v. Earnest, (1913), 229 U. S. 114, 57 L. Ed. 1096,

Grand Tr. W. Ry. Co. v. Lindsey (1914) 233 U. S. 42, 58 L. Ed. 838,
Seaboard Air Line R. Co. v. Horton, (1914), 233 U. S. 492, 58 L. Ed. 1062,
Toledo, L. & W. Ry. Co. v. Slavin, (1915), 236 U. S. 454, 458, 59 L. Ed. 671.

In the case of *Norfolk & W. R. Co. v. Earnest*, just cited, an instruction upon the defense of contributory negligence under the Federal Employers' Liability Act was criticized, one ground of the criticism being “(b) because it prescribed a wrong rule for the diminution in that it directed or permitted it to be made upon a comparison of the plaintiff's negligence with that of the defendant.” Agreeing with this criticism, the court said:

p. 121. “The other criticism deserves more discussion. The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words ‘as compared with the negligence of the defendant’ there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, ‘as compared with the combined negligence of himself and the defendant.’ We say this because the statutory direction that the diminution shall be ‘in proportion to the amount of negligence attributable to such employee’ means, and

canonly mean, that, where the casual negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 50, 56 L. Ed. 327, 346, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169."

In this case now under discussion it will be noted that the instructions at no place provide for the diminution of the damages "in proportion to the amount of negligence attributable to such employee." The instructions either state that contributory negligence is a bar, which shows clearly that the instructions are based upon the Constitution and Statutes of Oklahoma, or is omitted altogether, in which case the jury would necessarily be misled by erroneous instructions. In either event, we believe, the instructions, which Mr. Justice Owen states are "not a correct statement of the law," are prejudicial and should have been, by the Supreme Court of Oklahoma, considered a sufficient ground for a reversal of the judgment.

CONCLUSION.

This action was brought for personal injuries received by the plaintiff while handling a car en route from Wichita, Kansas, to New Orleans, Louisiana. The rights of the parties are controlled, in our judgment, by the Federal Employers' Liability Act, and the rules of law announced by the Supreme Court of the United States, and the inferior Federal courts.

The record in the trial court, in our judgment, required the motions of the defendants for a directed verdict in their favor, separately, to be sustained on the ground that the plaintiff assumed the risk of his injuries as a matter of law, as one directly connected with the necessary and usual methods of performing the work, or as a risk which he knew and appreciated or which was so obvious to all the other employees in the same or similar circumstances, as to charge him with the knowledge of the risk and the probable consequences thereof. We urge that the trial court, in refusing to sustain this motion for a directed verdict, committed prejudicial error against the defendants and each of them and that the Supreme Court of Oklahoma committed

prejudicial error in affirming the judgment and orders of the trial court in said cause.

We insist that the instructions of the trial court, on the defenses of assumption of risk and contributory negligence, were based upon the State statutes and the Constitution of Oklahoma and that the defendants were deprived of their right to have said defenses correctly stated when the case was submitted to the jury by the trial court in the erroneous instructions, which were given to the jury as a guide for their deliberation. We contend that this was prejudicial error and that the Supreme Court of Oklahoma, in affirming the judgment of the trial court and the orders made in connection therewith, committed prejudicial error and deprived these defendants of rights accruing to them under the Federal Employers' Liability Act by holding that the case was controlled, so far as their deliberations were concerned, by the statutes of Oklahoma on harmless error, and the Constitution of Oklahoma relating to assumption of risk and contributory negligence.

We urge the court to grant the application for writ of certiorari and issue the writ in accordance therewith, in order that the said error may be reviewed by this honorable court and a decision made in accordance with the rights of the parties under the Federal Employers'

Liability Act, and the Federal decisions thereon, based upon the evidence contained in the record herewith.

Respectfully submitted,

Robert C. Blake

~~W. H. Moore & Company~~

Attorneys for Petitioners.

W. P. Littlepage
Frederick J. Laiaferro

W. F. Dickinson

Of Counsel.

August 12, 1918.

APPENDIX "A."

Additional brief on rehearing filed by permission of the court (See *Ante*, page 331), December 20, 1917.

In the Supreme Court of the State of Oklahoma

THE CHICAGO ROCK ISLAND AND
PACIFIC RAILWAY COMPANY AND }
A. J. CARNEY,
Plaintiffs in Error, } No. 7646.
v.
FRED WARD.
Defendant in Error.

ADDITIONAL BRIEF ON REHEARING.

We desire to call the attention of the court to one feature of the case of *The Chicago, R. I. & P. Ry. Co. v. Hughes* (No. 7540, decided June 12, 1917, not officially reported), 166 Pac. 411, which we believe has es-

caped the attention of the court. In the opinion by Justice Hardy, the following remarks are made concerning instruction No. 10 given to the jury:

pp. 415-416. "The instruction No. 10, submitting the defense of assumption of risk, the court told the jury that a servant did not assume such risks as were created by the master's negligence. Exception was saved to this instruction, and defendant requested the court to charge the jury that, in entering defendant's employment, plaintiff assumed the hazard necessarily incident thereto, and also assumed the hazard as to all conditions which were open, obvious, and patent, and which were known to him, or by the exercise of reasonable care could have been ascertained by him. The rule that the servant never assumes the risk of the negligence of the master is not recognized in the federal courts. *Burke v. Union Coal & Coke Co.*, 157 Fed. 178, 84 C. C. A. 626; *C., O. & G. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96. The true rule in that regard in the courts of the United States is that the servant assumes all the ordinary risks of his employment which are known to him, or which could have been known with the exercise of ordinary care to a person of reasonable prudence and diligence under like circumstances; and with reference to risks not naturally incident to the occupation, but which may arise out of the failure of the master to exercise due care in providing a reasonably safe place in which to work and reasonably safe appliances with which to work, the rule is that the servant does not assume such risks until he becomes aware of the defect or improper construction in the place or appliances furnished to him, and of the risks arising therefrom, unless such defect and risk are so patent and obvious

that an ordinarily careful person would observe the one and appreciate the other. *Texas & P. Ry. Co. v. Harvey*, 228 U. S. 319, 33 Sup. Ct. 518, 57 L. Ed. 852; *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1063, L. R. A. 1915C, 1, Ann. Cas. 1915B 475; *Chesapeake & O. R. Co. v. DeAtley*, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016. And the same rule has been announced repeatedly by this court. *Osage Coal & Min. Co. v. Sperra*, 42 Okla. 726, 142 Pac. 1040; *Dewey Portland Cement Co. v. Blunt*, 38 Okla. 182, 132 Pac. 659; *M., O. & G. Ry. Co. v. Overmyre*, 160 Pac. 933.

When the court instructed the jury that the servant did not assume risks created by the master's negligence, he withdrew from consideration by them the defense as to such risks."

Instruction No. 10, referred to in the opinion, is iden-

tical in language, so far as the errors complained of, to instruction No. 11 in the Ward case. We print them here in parallel columns for the convenience of the court in comparing the same and place in italics the additional words found in instruction No. 11 in the Ward case not found in instruction No. 10 in the Hughes case:

"No. 11. You are *further* instructed that while a servant does not assume the extraordinary and unusual risks of the employment, yet on accepting employment he does assume all the ordi-

"No. 10. You are instructed that while a servant does not assume the extraordinary and unusual risks of the employment, yet on accepting employment, he does assume all the ordinary and usual

nary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the (203) master's negligence *nor such as are latent, or are only discoverable at the time of the injury.* The doctrine of an assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knew, or in the exercise of reasonable and ordinary care, should know the risk to which he is exposed, he will, as a rule, be held to have assumed them; but where he either does not know, or knowing, does not appreciate such risk, and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries." (204.)

risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows, or should in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the master's negligence. The doctrine of assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knows, or in the exercise of reasonable and ordinary care, should know the risks to which he is exposed, he will, as a rule, be held to have assumed them; but where he either does not know, or knowing, does not appreciate such risk, and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery "or injury." (249.)

It will be noted that the portion of the charge of which we complain: namely, that "he does not, however, assume such risks as are created by the master's negligence," is identical in both instructions and is not cured by the parts which follow it in instruction No. 11 in the Ward case. We presume it is sufficient to call the attention of the court to this matter.

The opinion of the court in the Ward case by Mr. Justice Owen cites the case of *M., O. & G. R. Co. v. Overmyre*, 160 Pac. 933, in addition to the case of the *Chicago, R. I. & P. Ry. Co. v. Hughes* in support of the position taken by him; namely, that the case should be affirmed. This case was brought under the state laws and constitution of Oklahoma, as is shown by the portion of the opinion as follows:

"The defense of assumption of risk being made, by Section 6, Art. 23, Constitution, a question of fact to be left to the jury, and there being evidence properly warranting its submission, the verdict of the jury thereon is conclusive." Citing cases.

The case of *Devine v. The Chicago, R. I. & P. Ry. Co.* (1914), 266 Ill. 248, 107 N. E. 595 was one brought under the Federal Employers' Liability Act. The contention, however, in the Supreme Court of Illinois which wrote the opinion quoted from was that "the court erred in refusing to direct a verdict for it because there was no competent evidence that the particular service in which the deceased

was engaged at the time he was killed was interstate commerce" and also, "that there was no evidence in the record from which the negligence of the engineer can be reasonably inferred." It will be seen from a reading of the opinion that the question of whether or not the instruction on assumption of risk properly left to the jury the question of the assumption of the risk of the master's negligence was not involved.

Respectfully submitted.

R. J. ROBERTS,
C. O. BLAKE,
W. H. MOORE,
JOHN E. DUMARS,
ABERNATHY & HOWELL.

Dec. 17, 1917.

APPENDIX "B."

First opinion by Mr. Justice Owen published by the court November 20, 1917 (See *ante*, p. 310). Opinion withdrawn for correction and refiled (See *ante*, p. 332).

The portions of the opinion omitted after correction are indicated in the brackets; those inserted by correction, not in the original form of the opinion, are placed in *italics*.

In the Supreme Court of the State of Oklahoma

THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY, AND
A. J. CARNEY,

Plaintiffs in Error,

v.

FRED WARD,

Defendants in Error.

} No. 7646.

SYLLABUS.

I.

Under the Federal Employers' Liability Act the servant assumes all the ordinary risks of his

employment which are known to him or which could have been known by the exercise of ordinary care to a person of reasonable prudence and diligence in like circumstances. Risks not naturally incident to the occupation, but which arise from the negligence of the master, are not assumed by the servant until he becomes aware of such negligence and of the risk arising therefrom, unless the negligence and risks are so apparent and obvious that an ordinarily careful person would observe the one and appreciate the other. Whether the risk is an ordinary risk of the employment, or an extraordinary risk known to the servant, or with knowledge of which he is chargeable, is a question of fact to be submitted to the jury.

II.

Plaintiff sued defendant for injuries sustained in falling from a box car, alleging the failure to uncouple and the sudden and unusual stopping of the string of cars on which he was working constituted negligence. The court instructed the jury that plaintiff assumed all the ordinary and usual risks of the employment of which he had knowledge, or should, in the exercise of reasonable care, have known to exist, but that he did not assume such risks as were created by the master's negligence. *Held*, the servant does assume risks arising from the negligence of the master after he becomes aware of such negligence and risks, or when they are so apparent and obvious that an ordinarily careful person would observe the one and appreciate the other, hence that portion of the instruction to the effect he did not assume such risk was error, but, applied to the facts in this case, was not prejudicial, for the reason, if the failing to un-

couple and sudden stopping of the cars amounted to negligence of the master, and the risk caused thereby was not a usual risk of the employment, such risk being coincident with the injury was not assumed by the plaintiff because he could not have had knowledge of it.

III.

Instructions to the effect that contributory negligence is a bar to the servant's recovery under the terms of the Federal Employers' Liability Act is not a correct statement of the law, but being **error in the master's favor**, is not sufficient to reverse the judgment based upon the master's negligence.

IV.

The requirement of the U. S. Const., 7th Amendment, that trials by jury be according to the course of the common law, i. e., by unanimous **verdict**, does not control the state courts, even when enforcing rights under a Federal Statute like the Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, chapt. 149, Comp. Stat. 1913, Sec. 8657), and such courts may, therefore, give effect in actions under that statute to a local practice permitting a less than unanimous verdict.

Error from the Superior Court of Pottawattomie County. Hon. Leander G. Pittman, Judge.

Affirmed (on rehearing).

R. J. Roberts, C. O. Blake, W. H. Moore, K. W. Shartel and Abernathy & Howell, attorneys for plaintiffs in error.

T. G. Cutlip, W. S. Pendleton and R. A. Rogers, attorneys for defendant in error.

Opinion of the Court by OWEN, J.

Fred Ward, [the] plaintiff in the trial court, was employed by the railway company in the capacity of switchman, and while working on the top of a moving box car in the railway company's switch yards at Shawnee, [sustained serious injuries], *was injured*, by falling from the car. He sued the railway company [defendant below], for negligence in the manner of switching the cars on which he working, alleging that the engine foreman, an employee of the company [and one of the plaintiffs in error here], negligently directed the engineer [of the engine which was shoving the cars on which he was working] to stop [or] and suddenly check *the cars* in such [a] manner as to cause him to lose his balance and fall. He alleges that it was the duty of the engine foreman to uncouple the cars from the switch engine as soon as they were shoved upon the switch tracks thereby permitting the cars to run down grade and be stopped by plaintiff, and that the failure of the foreman to discharge this duty and the sudden stopping of the cars amounted to negligence and was the proximate cause of his injury. The defendants answered by general denial and by alleging assumption of risk and contributory negligence on [the]

part of the plaintiff. Judgment below was for plaintiff. Defendants bring the case here.

To reverse the judgment of the lower court plaintiffs in error [allege] *urge* two assignments. First, [that] the motion for an instructed verdict for defendants should have been sustained because the plaintiff assumed the risk of the injury as a matter of law. Second, erroneous instructions relating to (a) assumption of risk, (b) majority verdict and (c) contributory negligence.

Under the first assignment plaintiff in error insists that the proof [in this case being to the effect that the car from which defendant in error fell was in transit from Kansas to Louisiana] brings the case within the provisions of the Federal Employers' Liability Act, and *that* under the terms of this act defendant [assumes] *assumed* the risk [of injury] complained of. Neither of the defendants in their answer claimed the benefits of the Federal Employers' Liability Act, or made any reference to the car from which plaintiff fell being engaged in interstate commerce. Assuming, without deciding, that merely proving [that] the car was a part of an interstate commerce shipment was sufficient to bring the case within the terms of the Federal [Employers' Liability] Act, it does not [necessarily] follow that the [judgment of the] lower court should be [reversed]. This] *have directed a verdict for defendant* for the reason that under the terms of the Federal Employers' Liability Act the plaintiff [Ward,]

assumed only the ordinary and usual dangers incident to the employment which were known to him or which could have been known by the exercise of ordinary care by a person of reasonable prudence and diligence under like circumstances [and did not assume the dangers incident to a negligent manner of switching the cars upon which he was working.

In the case of *C. R. I. & P. Ry. Co. v. Hughes*, 166 Pac. 411, the rule of assumption of risk was announced by this court, in an opinion by Mr. Justice Hardy, in the following language:

“The true rule in that regard in the courts of the United States is that the servant assumes all the ordinary risks of his employment which are known to him or which could have been known with the exercise of ordinary care to a person of reasonable prudence and diligence under like circumstances.”

In the case of *M. O. & G. Ry. Co. v. Overmyre*, 160 Pac. 933, this Court, in an opinion by the present Chief Justice, said:

“The master’s negligence of which the servant is ignorant or not properly chargeable, is a risk not assumed by the latter. Whether the risk was an ordinary risk of the employment, or whether an extraordinary risk, known to and appreciated by the deceased, or with knowledge of which he was properly chargeable, was a question of fact to be left to and determined by the jury.”

To the same effect are the following cases: *Osage Coal & Min. Co. v. Sperra*, 42 Okla. 726, 142 Pac. 1040; *Dewey Portland Cement Co. v. Blunt*, 38 Okla. 182, 132 Pac. 659.]

It may be said that a railway brakeman, working upon the top of moving box cars, is engaged in a hazardous business and is at any time liable to serious injury and that he assumes this risk when entering upon the employment. But the servant does not assume the risk incident to the negligence of the master until he becomes aware of such negligence and of the risk arising therefrom unless the negligence and risk are so apparent and obvious that an ordinarily careful person would observe the one and appreciate the other. *C. R. I. & P. Ry. Co. v. Hughes* (Okla.), 166 Pac. 411; *M. O. & G. Ry. Co. v. Overmyre* (Okla.), 160 Pac. 933; *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062. In this case plaintiff alleged the failure to uncouple and the forcible and sudden stopping of the cars with unusual violence amounted to negligence. [In this case plaintiff below alleged that the failure to uncouple and the stopping of the cars at the time and place amounted to negligence.] It cannot be said as a matter of law that he [plaintiff] assumed the [such] risk incident to this method of switching if the allegation be true.

In the case of *Devine v. C., R. I. & P. Ry. Co.*, 266 Ills. 248, 107 N. E. 595, it was held:

“Where a brakeman is killed by being thrown from the top of a car by the negligence of the engineer in suddenly stopping the train with unnecessary violence, the risk of such negligence is not one assumed by the deceased.”

Whether the risk was an ordinary one of the employment assumed by the servant or one arising from the negligence of the master, and with which the plaintiff was or was not chargeable, was a question of fact to be determined by the jury. Section 6, Art. 23, Const. (355 Williams' Ann.) M. O. & G. Ry. Co. v. Overmyre, Supra.

[Whether the method of switching on this particular occasion and in the circumstances amounted to negligence, and whether the danger incident to such manner of switching was a usual and ordinary danger incident to the employment were questions of fact and were properly submitted to the jury under a proper definition of negligence.]

Under the second assignment plaintiff in error complains of the instructions dealing with the assumption of risk and contributory negligence. *As to contributory negligence the jury was instructed the plaintiff could not recover if his negligence contributed to the injury. This was not a correct statement of the law but the error is one of which the defendant cannot complain.* [As has been said, the trial court submitted to

the jury, under a proper definition, what constituted contributory negligence. And also instructed the jury that plaintiff assumed the ordinary and usual risk of his employment, but not such risks as were caused by the master's negligence. The jury was also instructed that plaintiff could not recover if his contributory negligence caused the injury or if the risk was one of the usual or ordinary risks incident to the employment. This was a fair statement of the law of assumption of risk under the Federal Employers' Liability Act and it was even more favorable than the defendant was entitled to have the jury instructed concerning contributory negligence.] Under the Federal *Employers' Liability Act* contributory negligence goes only in mitigation [of] or to reduce the damage. It is a comparative defense and not a defense in bar.

The instructions complained of as to the assumption of risk, taken as a whole, are to the effect that plaintiff assumed all the ordinary and usual risks and perils incident to the employment, whether they be dangerous or otherwise, and also all risks which he knew or should, in the exercise of reasonable care, have known to exist. But in paragraph 11 appears the following language:

"He does not, however, assume such risks as are created by the master's negligence."

The servant does assume the risks incident to the master's negligence after he becomes aware of the same,

or where the negligence and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. *C., R. I. & P. Ry. Co. v. Hughes, supra.* It was not a correct statement of the rule to instruct the jury without qualification that plaintiff did not assume such risks as were created by the master's negligence. It does not necessarily follow, however, that the case must be reversed for that reason. The negligence complained of was the failure to uncouple the cars and the sudden stopping with such force as to throw plaintiff from the top of the box car. If this was an usual method of switching and amounted to negligence, in the nature of things, plaintiff could not have been aware of the negligence previous to the injury so as to have assumed the risk incident thereto. It was a question of fact, as has been said, to be determined by the jury whether this method of switching was usual or amounted to negligence. The jury was instructed that plaintiff could not recover unless this method amounted to negligence, or if it was a usual and ordinary risk of the employment. The jury must have found that it amounted to negligence, and was not the usual method of switching and an ordinary risk. Therefore, the jury was not misled by the failure of the court to qualify the instruction that the plaintiff did assume the dangers incident to the master's negligence of which he was aware. Under Sec. 6005,

R. L. 1910, we may not set aside the verdict for this reason unless, after an examination of the entire record it appears that the error complained of has probably resulted in the miscarriage of justice.

It is further contended under the second assignment, that the court erred in receiving a verdict signed by 9 jurors. It is insisted that the proof, bringing the case within the terms of the Federal Employers' Liability Act, the railway company was entitled to a unanimous verdict of twelve; that is to say, because the cause of action arose under a federal statute, the case must be tried according to federal procedure requiring a jury of twelve. [Exactly] this contention was made in the case of *St. L. & S. F. Ry. Co. v. Brown*, 45 Okla. 143, 144 Pac. 1075, and denied by this court, [said]:

[“The Seventh Amendment to the Constitution of the United States has no application to trials in the state courts. The state has a right to regulate trials in its own courts in its own way.”]

In affirming [that judgment] *this court in that case*, the Supreme Court of the United States [on that proposition] said:

“The requirement of the U. S. Const. 7th Amend., that trials by jury be according to the course of the common law, i. e. [by] a unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the

Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, Chap. 149, Comp. Stat. 1913, sec. 8657) and such courts may, therefore, give effect in actions under that statute to [a] local practice permitting a less than unanimous verdict." (241 U. S. 223, 60 L. Ed.)

Finding no reversible error, the judgment of the lower court is affirmed.

All the Justices concur, except Sharp, C. J., dissenting.

No. 639198

APR 6 1918
JAMES D. MAHER
U.S. DISTRICT ATTORNEY

In the Supreme Court of the
United States

APRIL TERM, 1918.

U.S. DISTRICT ATTORNEY
FILED
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JAMES D. MAHER
U.S. DISTRICT ATTORNEY

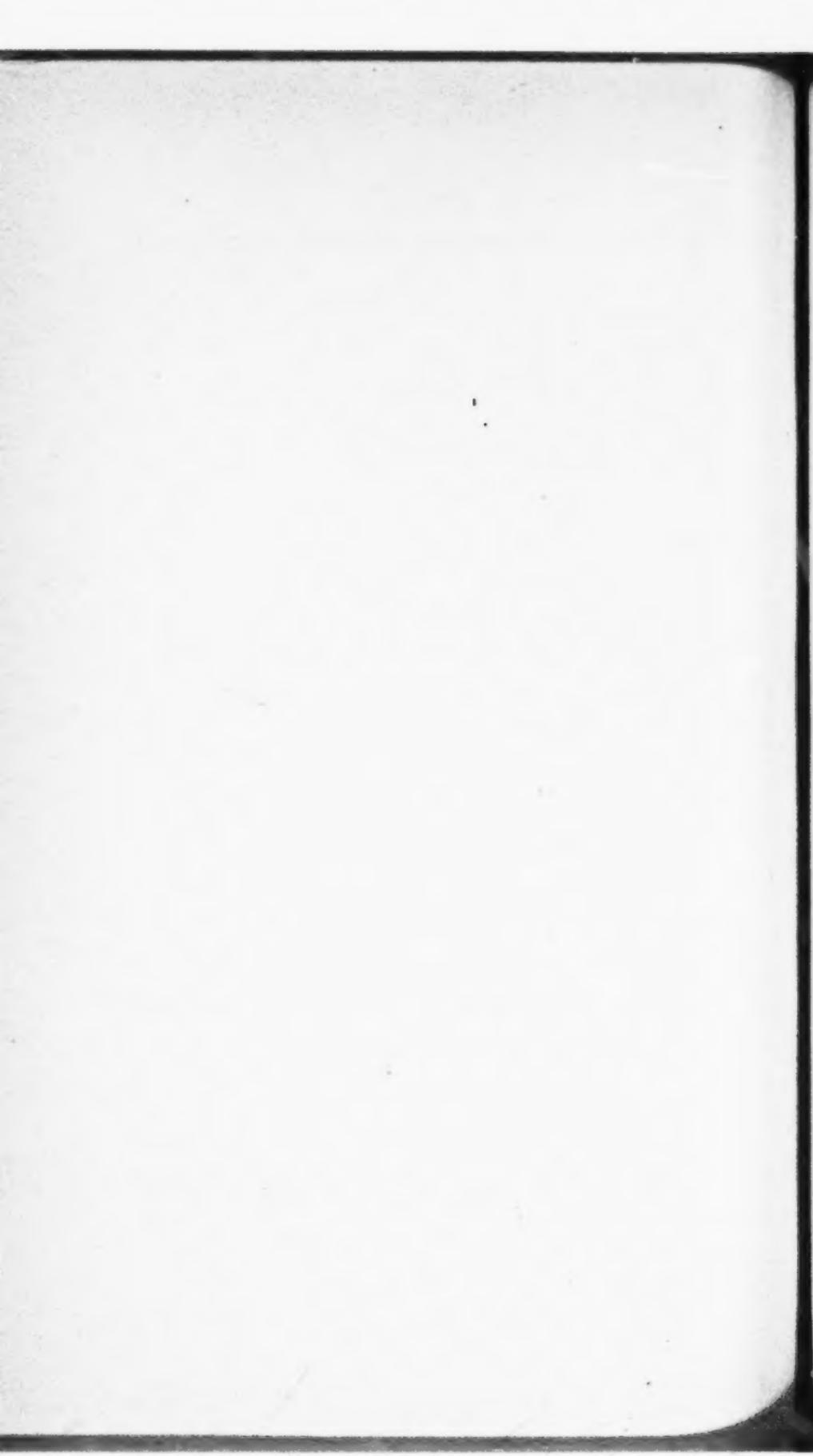
THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY AND A. J. CAR-
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FRED WARD, RESPONDENT.

In the Matter of the Application for Writ of Certiorari
by the Petitioners.

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In the Supreme Court of the United States

April Term, 1918.

No. -----

THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY AND A. J. CAR-
NEY, PETITIONERS,

vs.

FRED WARD, RESPONDENT.

*In the Matter of the Application for Writ of Certiorari
by the Petitioners.*

**BRIEF AND ARGUMENT OF FRED WARD, RE-
SPONDENT, RESISTING THE ABOVE
APPLICATION.**

*To the Honorable, The Supreme Court of the United
States:*

Respondent hereby accepts as substantially correct
the statement of the case made by petitioners except as
objected to hereafter.

Respondent says petitioners are not entitled to the writ of *certiorari* prayed for for the following reasons:

First. Because no right under the Federal Employers' Liability Act was set up and claimed in the trial court or the Supreme Court of the State of Oklahoma in form and manner required by the law and practice of said courts.

Second. Because the errors allowed and complained of by petitioners appear to be entirely *non-prejudicial* and frivolous.

Petitioners do not claim to have set up any rights in their pleadings in the trial court, but they claim to have made proof that the car on which respondent was working at the time of the injury was being employed and used in interstate commerce.

Do the decisions of the Supreme Court of the United States hold to the rule that the testimony alone is sufficient to bring a cause within the provisions of the Federal Act with or without an amendment of the pleadings or a request for such purpose?

(The testimony upon the points now under consideration have been set out in full.) If the plaintiffs in error sought to invoke the provisions of the Federal Act they veiled it to the last moment.

At page 139 of the case-made, a Mr. March was called by the plaintiffs in error and the testimony offered

was objected to and the objection sustained, whereupon Mr. Roberts of counsel for the plaintiffs in error then and now offered to prove by the witness March, inspector for the C., R. I. & P. Ry. Co., that the car C., R. I. & P. 56643 was without defect and conformed to the standard established by the Interstate Commerce Commission of cars used in the interstate commerce. In this offer no reference was had to the service in which the C., R. I. & P. car numbered 56643, as testified to by Mr. Carney, was engaged. The invocation of the provision of the Federal Act first appeared after this case had been tried in the court and upon a joint application of the plaintiff and defendant a new trial had been awarded. The second trial was on, the plaintiff had testified in support of the averments in his petition and had called several witnesses in corroboration thereof and had rested.

At page 99 of the case-made, the plaintiffs in error interposed a joint demurrer to the evidence offered on behalf of the plaintiff to the effect that the evidence adduced, together with all reasonable inferences to be therefrom drawn fails to make out a case in favor of the plaintiff and against the defendants or either of them. At this point, and after the plaintiff below had rested in chief, the veiled intention, if intention it then had, of invoking the rule now contended for was still held within the shadow and was not disclosed until such time as the offer was made for an instructed verdict.

The plaintiffs in error have contended, as shown by briefs filed, that the testimony disclosed that the provisions of the Federal Act were invoked and at the same time admitting that the pleadings did not disclose either by terms or in effect that the provisions of the Federal Act were called in question, and later asked an instruction to the effect, upon the assumption of risk under the provisions of the Federal Act, and also contended, and are still contending, that notwithstanding the pleadings did not call in question or invoke the provisions of the Federal Act, still the testimony was sufficient to do so and cited a number of cases which it has been claimed invoked the rule that the testimony alone is sufficient to bring the present case within the provisions of the Federal Act.

Among the cases cited to the effect, as above stated, are the:

Missouri, Kansas & Texas Railway Co. v. Wulf, 226 U. S. 570.

Grand Trunk Western R. Co. v. Lindsay, 223 U. S. 42, and

St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702.

These cases have been called to the attention of the Supreme Court of the United States in *Atlantic Coast Line Railroad Company v. Lizzie M. Mims, Administrator of the Estate of John J. Mims*, in 61 Law Edition (U. S. 242) at page 476 thereof. The opinion in

this case was rendered by Mr. Justice Clark, who found the facts substantially as follows:

On December 10, 1910, John J. Mims, a car inspector in the employ of the plaintiff in error, when attempting to cross a track to inspect a train of cars which had just arrived, was run down by a switch engine at a public crossing in the city of Sumpter, S. Carolina. The court in discussing the pleadings stated:

“There is nothing in the complaint tending to state a cause of action under the Federal law. To this complaint the defendant filed an answer which is a specific denial under the South Carolina Code of Civil Procedure, and which contains two separate defenses. The first defense admits that Mims was killed at the time alleged; admits the paragraph alleging that the defendant at the time of the accident complained of, owned and operated a line of railroad described as being wholly within the state of South Carolina, and denies all the other allegations of the complaint.

“The second defense is one of contributory negligence. Upon this complaint and answer the case went to trial, and when the testimony was all introduced the trial court granted a non-suit, which was reversed by the Supreme Court of the state, with an order remanding the case for a new trial.

“When the case was called for the second trial the defendant asked leave to amend its answer by pleading ‘gross and willful contributory negligence’ on the part of the deceased, which was granted, and the trial proceeded until the plaintiff rested her case. Up to this time no claim had been made by the defendant, and no fact had been pleaded or evidence offered by either party from which it could be inferred that the deceased at the time of his

death was engaged in interstate commerce, or that the Federal Employers' Liability Act was in any manner applicable to the case."

We pause here to suggest that in the instant case, as before stated, neither the petition as amended, nor the answer of the defendants below, called in question the provisions of the Federal law. The Federal Act was not pleaded in terms or in effect.

The instant case had been once tried in the trial court and a second trial had been ordered; the plaintiff had introduced his testimony and rested. Up to this time no claim whatever or nothing from which could be inferred that the plaintiff below, at the time of the accident, was in any wise engaged in interstate commerce, or that the car upon which he was riding, numbered C56643, was employed at that time in the service of interstate commerce. After the plaintiff had rested in chief, and after the defendants had rested in chief, and the case was closed and the jury ready to be instructed, the plaintiffs in error then requested an instruction directing the jury to return a verdict in favor of the defendants as a matter of law, and for the first time called in question or referred to the Federal Employers' Liability Act.

At that time no effort was made to amend the answer to conform to the testimony as offered and received, nor was any request for such permission made,

and thus far the facts in the Mims case and the one at bar are almost parallel both as to the nature of the pleadings and the questions under consideration.

In the Mims case, after the plaintiff rested her case, on the second trial, the Railway Company for the first time offered to introduce testimony which it claimed, if admitted, would have tended to prove that the car which the deceased was in the act of approaching to inspect, when he was killed, was "engaged in interstate commerce, and that the deceased was in this respect and otherwise engaged in interstate commerce."

The trial court rejected this proffer of testimony on the ground it came too late and was not relevant to any issue tendered by the pleadings in the case. The Railway Company made no application for leave to amend the answer by adding a defense under the Federal law.

In the Mims case the South Carolina court fully recognized the character of the Federal Employers' Liability Act, when the facts making it applicable were properly pleaded; and when properly pleaded would make its consideration competent. Yet, this court decided that under the settled rule of pleadings in the state of South Carolina the evidence tendered was not admissible. The testimony admitted in the case showed the car which the deceased was about to inspect was a local freight train, and on the morning of the accident com-

plained of was operating wholly within the state of South Carolina.

In the relation of the deceased to the traffic which this intrastate train carried was such as to give an interstate character to this service that fact must have been known to the defendant from the date the accident occurred, and it could not possibly have been known to the plaintiff, and therefore surprise and delay certainly would have followed.

In the instant case Ward was in the employ of the Railway Company, located as a switchman at the city of Shawnee. Train No. 92 came from the west, and from the testimony train No. 92 came also from the east. It became necessary to rearrange train No. 92 going east, and in doing so a cut of cars to the number of 18 or 20 were shoved off from the main train for the purpose of placing them on track No. 10. The switching was done in the night time. Mr. Carney, one of the plaintiffs in error, and the defendant in error were connected with this cut. Mr. Carney gave the direction that quite a bundle was being "kicked" and for the defendant in error to take charge of the same. It would have been a physical impossibility for the defendant in error to have known in what service the car upon which he was riding was engaged, that is to say, whether it was an intrastate or interstate commerce. Equally impossible was it for Mr. Carney, one of the plaintiffs in error, to know in

what service this particular car was at that time engaged. The record kept by the Railway Company disclosed the destination and the service in which each and every car in said cut were at that time engaged. This fact was known to the plaintiffs in error from the very date of the accident, but could not possibly have been known by the defendant in error. Later on in the night Mr. Carney checked the list of cars and from that check and from the list made at that time determined the car on which Mr. Ward was at the time of the accident. He gave the number as 56643. The fair inference is that this fact was learned by him some hours afterwards, and his testimony was relied upon by the Railway Company with reference to the service of this car and its destination.

In the Mims case the Supreme Court found that the result which would inevitably have followed if the testimony offered by the Railway Company should have been determined, and at the second trial, and without any claim or defense under the Federal Act having been especially set up and claimed, the rule invoked in this case was not applicable. In the body of the opinion the Supreme Court stated:

“This epitome of the action of the state court shows that the claim under the Federal Act now made was not presented until after the plaintiff had rested in the second trial of the case after it had been to the Supreme Court, and after the defendant, upon the opening of this second trial, had amended

its answer without mentioning or in any manner attempting to plead the Federal claim. *Even at this stage of the trial the assertion of the claim consisted only in the tender of testimony without any application to amend the answer.*"

Again we suggest that in the instant case and upon the second trial and after the plaintiff had rested and the defendant had rested, for the first time the attention of the trial court was called to the provision of the Federal Act by the offering of a peremptory instruction to the effect that the matter was one of law and not of fact and should be determined by the court and not by the jury.

The Supreme Court in the Mims case, at page 476 of the 61 Law Edition, as aforesaid continues:

"To become the basis of a proceeding in error from this court to the Supreme Court of a state 'a right, privilege or immunity' claimed under the statute of the United States must be set up and must be decided by the state court. Rev. St. Sec. 709. This means the claim must be asserted at the proper time and in the proper manner by pleading motion or other appropriate action under the state system of pleadings and practice."

The Supreme Court of the United States, in construing the meaning of the Supreme Court of the United States in the decision above referred to, uses the following language, page 478 in the report of the Mims case:

"The plaintiff in error mistakenly argued that,

under recent decisions of this court, it is not necessary to claim the benefits of the Federal Employers' Liability Act in a pleading in a state court in order to obtain a review here of a decision denying or refusing to consider such a claim. Reference to the decision relied upon shows that the Federal right was in terms claimed in the petition in the *Missouri, Kansas & Texas Railway Company v. Wulf*, 226 U. S. 570, and *Grand Trunk Western Railway Company v. Lindsay*, 233 U. S. 42."

And that in *St. Louis, I. N. & S. R. Co. v. Hesterly*, 228 U. S., the decision proceeds upon the statement that, since the Supreme Court of the state held the Federal question sufficiently raised and decided it, the objection that it was not saved was not open in this court. The United States Supreme Court finally held:

"While it is true that a substantive right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the State Supreme Court under its established system of practice and pleadings."

The refusal of the trial court and the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a Federal right which this court can review.

Baldwin v. Kansas, 129 U. S. 52.
Oxley Stave Co. v. Butler Co., 166 U. S. 648.

In the same opinion the Supreme Court stated:

“While it is true that reports show that in *St. Louis & San Francisco Co. v. Seale*, 229 U. S. 156, and in *Toledo St. & W. R. Co. v. Slavin*, 236 U. S. 454, the Federal Act was not especially referred to in the pleadings, yet they were in such form that the trial court, either without objection or over the objection which the Supreme Court of the state refused to sustain, admitted testimony making it necessary to apply the Federal Act in deciding each case. This of course was equivalent to holding that the pleadings in a trial court was in a form to justify the introduction of testimony in support of the Federal claim under the system of practice and pleadings prevailing in the courts of the two states in which the cases were decided. This brings these decisions clearly within the principle of the conclusion we are announcing in this case.”

Note in *particular*, that the Mims case clears up a good deal of misapprehension, which seems to have existed among the state courts, and a few even of the Federal courts, as to what tribunal has the power to decide when the Federal question has been properly raised—or “set up and claimed”—in the state court under the state practice.

The idea seems to have been generally prevalent with the state courts, that the U. S. Supreme Court had assumed that jurisdiction, and it cannot be denied that this idea has been supported by the language used by this Honorable Court in a few decisions, especially the Seale case, 57 L. Ed. 1129, 1134, 229 U. S. R. 156, 161, and the Slavin case, 59 L. Ed. 671. In the former

case the court took pains to mention the manner in which the defendant had attempted to raise the Federal question, and without referring to any holding of the Texas Supreme Court on the question, if any, held apparently upon the facts, that the question had been properly raised in the trial court.

The language of the decision in that case and the Slavin case was calculated to confirm the general opinion that the power to decide when a Federal question has been properly raised in a state court *under the state practice* rests wholly in the United States Supreme Court. Undoubtedly that was the construction placed on the case by Hon. Commissioner Edwards of Oklahoma Commission. No doubt also many other cases found their way by *certiorari* to the U. S. Supreme Court by mere comparison of facts, until finally this Honorable Court, becoming aware of this widespread opinion, undertook in the Mims case to clear up all obscurities and remove all doubts.

In a comprehensive opinion in the Mims case, after a careful review of all the authorities, which have been regarded as supporting the position of plaintiffs in error, this Honorable Court declares in substance that those cases should have been and must hereafter be construed as based in each instance on the theory that the state court had expressly or by necessary implication, by its language, held the Federal questions to have been

properly raised under the state practice, holding in substance that the state court, at least in the first instance, is expected to exercise that prerogative, and that its decision will not be disturbed by the U. S. Supreme Court, except in case of a gross and palpable error.

“To become the basis of a proceeding in error from this court to the Supreme Court of the state, ‘a right, privilege or immunity’ claimed under the statute of the United States *must be set up and must be decided by the state court.*”

Again:

“The plaintiff in error mistakenly argued that under recent decisions of this court it is not necessary to claim the benefits of the Federal Employers’ Liability Act in a pleading in a state court in order to obtain a review here of a decision denying or refusing to consider such a claim.”

This knocks the foundation from under the contention of plaintiffs in error, in support of which they have cited certain cases, that the question may be properly raised by offering in evidence to prove it, without pleading it. This language also furnishes a strong negative influence, that if the question were up to this Honorable Court to decide without reference to the state court, the decision would be that the application of the Employers’ Liability Act cannot be secured by the mere proof of the necessary facts, without “setting up and claiming” it by some form of pleading. While this court may not take judicial notice of the rules of practice in force in any state, yet from its general knowledge of the practice in the different states under the common law

and the code system, it would be justified in assuming that *no issue can be made matter of record in any court of record* except by some form of pleading. This is fundamental and too plain for argument.

Now, while we can show the insufficiency of the evidence to bring this case under the Federal Employers' Liability Act, we feel that the only question now pertinent to our first proposition is, whether the trial court or the State Supreme Court of Oklahoma has *decided* any question or issue under the Federal Employers' Liability Act, or has in any way recognized the application of that act to the case at bar. Plaintiffs in error admit that the trial court has not; indeed it is the burden of their complaint that every act and ruling of the trial court was solely under the state law: Likewise they complain with apparently *sincere* indignation that the State Supreme Court has ignored the Liability Act altogether in its opinion, even going so far as to support said opinion by divers citations of state statutes instead of said Liability Act.

Counsel for plaintiffs in error seem to have argued themselves out of the court; in this: They start out with the admission that the Federal question was not raised or attempted to be in the trial court by any pleading, and with the assertion that it could be and was raised by the evidence. They are driven from this by the language of the Mims case above quoted. Their only alternative was therefore to show that the State Supreme Court has "expressly or by necessary implication" ad-

mitted that the question was properly raised in the trial court. They are cut off from this by their vehement complaint that the state court has not made any such admission, alleging as error its failure to do so.

Let us see, now, what the Oklahoma Supreme Court did say about it:

“Under the first assignment plaintiffs in error insist that the proof brings the case within the provisions of the Federal Employers’ Liability Act, defendant” (in error) “assumed the risk complained of. Neither of the defendants in their answer claimed the benefits of the Federal Employers’ Liability Act, or made any reference to the car from which plaintiff fell being engaged in *interstate commerce*. *Assuming, without deciding*, that merely proving that the car was part of an interstate commerce shipment was sufficient to bring the case within the terms of the Federal Act, it does not follow that the lower court should have directed a verdict for defendants.”

So we see that the claim of defendants to the benefits of the Federal Act was not “set up and claimed” in the trial court in manner and form regarded by the Supreme Court as sufficient.

But we take issue with plaintiffs in error in their claim that they have made proof sufficient to bring this within the terms of the Federal Employers’ Liability Act. They offered the evidence of A. J. Carney as follows (page 111, C.-M.):

“Q. Mr. Carney, you say you checked this list; you say you checked these cars; do you remember

the number of the car, the last car in the cut in which Ward was riding?

A. 56643, Rock Island.

Q. Where was that car going?

[47 L. R. A. (N. S.) 38, L. R. A. 1915, c. 47, (3 L. R. A. 33).]

A. It was going to New Orleans by way of Alexandria, La.

Q. Where was it from?

A. Wichita, Kansas."

Prior to this they had interrogated the plaintiff Ward on the same question, as shown on page 71, case-made:

"Q. Do you remember the number of the car you were on, Mr. Ward, at the time you fell off?

A. Yes, sir.

Q. What was it?

A. C56643."

The statements of Ward and Carney are conflicting.

It is worth noting that Ward was asked the question, on his recall, just after the close of his testimony in the early stages of the case and before defendants had developed their intention to invoke the Federal Employers' Liability Act, making it improbable that he would have intentionally falsified. If, however, Ward knew of their purpose, they might plausibly claim that his interest in the case was sufficient to discredit him. On the other hand, Carney, being the party charged with negli-

gence, ran the risk of being punished by the company, his co-defendant in case of a verdict for the plaintiff. So far, honors might be regarded as even. But the evidence of E. D. Reasor, a witness of plaintiff, called for impeachment, shows Carney to be utterly unreliable as a witness (C.-M., p. —).

This leaves the preponderance of the evidence decidedly with the plaintiff on the issue of the sufficiency of the proof to bring the case within the terms of the Federal Act, even on the theory contended for by plaintiffs in error. They did not make sufficient proof to satisfy any court.

We therefore respectfully insist that this Honorable Court is without jurisdiction and plaintiffs in error are not entitled to writ prayed for.

PROPOSITION SECOND.

“The alleged errors of the trial court in giving instructions as to assumed risk and contributory negligence were harmless and not prejudicial misdirections.”

Under this second proposition the plaintiffs in error can claim no consideration in this court, unless they shall have convinced the court under the first. The errors alleged can only be urged as grounds for reversal if the court holds the case to be within the terms of the Federal Employers' Liability Act.

But the defendant in error will discuss them and notice their argument for the double purpose of: first, corroborating and strengthening his claim that there is lack of jurisdiction—that no Federal question was properly raised in the trial court; and, second, of showing that they are non-prejudicial, even frivolous, and shall therefore ask the court to *affirm* the judgment of the state court on the brief of plaintiffs in error. If this Honorable Court has not jurisdiction, the writ will be denied; while if it has jurisdiction, we shall ask the court to affirm the judgment of the state court for lack of merit in the contentions of plaintiffs in error on the authority of *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 426, 60 L. Ed. 1102; *Great Northern R. Co. v. Knapp*,

240 U. S. 464, 6 L. Ed. 745; *Yazoo & M. V. Ry. Co. v. Wright*; and especially *Railway Co. v. Nelson*, 212 Fed. 69.

We have been able to find but two classes of cases wherein an injured employee is held to have assumed the risk of employers' negligence; first, where the employer negligently fails to furnish the employee safe and proper tools and appliances; second, where the employer negligently fails to furnish the employee a safe place in which to work. The second class has been held by this court to embrace a "system or method of work." *Chesapeake & O. R. Co. v. Proffitt, supra*. In all cases the negligence on account of which risk is assumed by the injured employee must exist at the time when the employee begins to use the defective tool, or to work in the place furnished, or becomes connected with a particular system or method of work or of doing business. In all cases the defect inheres in the tool, place, or system, is continuous, and must be known to the employee before his injury, or be so plain as to be easily observable by an ordinary person. All the cases cited by counsel for plaintiffs in error on the question of assumed risk fall into one or other of these classes.

We challenge counsel to produce a case from a court of last resort where an employee is held to have assumed beforehand the risk that his employer may at some future date be guilty by commission or omission of

an act of negligence. On the contrary, all the cases, and common sense also hold, that the employee is entitled to the presumption that his employee will use due care. There is no such thing as assuming the risk of negligence, which at the time of the assumption has not yet occurred and may never occur.

That is the case at bar in a nutshell. Plaintiff does not complain of a defective tool or appliance, of a defective place in which to work, or of a defective system or method of work, but of the *negligence* of the switch foreman, Carney, *in carrying on the work*; in causing the engineer to slow up the train so suddenly and then failing to uncouple the cars in time to prevent the shock caused by the conflict of the two motions from passing on to plaintiff at a time when in the performance of his duty he was taking hold of the brake at the end of the car.

For some time after counsel for plaintiffs in error advanced this novel idea, we had not been able in our investigations to find it in print before, and were inclined to concede counsel's absolute and exclusive right to a patent, or copyright, for an invention so rare and extraordinary. The brilliancy of it certainly has never been excelled, and probably never equalled, except by the suggestions of certain fantastic geniuses to the Naval Advisory Board of plans for throttling the submarine.

But, for counsel's sake, we regret to say we at last

stumbled on the case of *Divine v. C., R. I. & P. Ry. Co.*, 226 Ill., which knocks all the novelty and originality out of counsel's claim. Indeed, that case bears such a close resemblance to the case at bar that it will be useful to quote from it at this point.

“Where a brakeman is killed by being thrown from the top of a car by the negligence of the engineer in suddenly stopping the train with unnecessary violence, the risk of such negligence is not one assumed by the deceased.”

This is much like the case at bar, except it is not so strong. We do complain of the sudden stopping of the train at the instance of the switch foreman, but more because he negligently failed to uncouple the train in time to save us from being knocked off the car and almost killed.

Counsel for plaintiffs in error have (no doubt inadvertently) in their statement of the nature of the case failed to give defendant in error credit for having, as plaintiff, charged as negligence the failure of the foreman, Carney, to uncouple the train in time to prevent the shock from passing on to plaintiff. Here is what they say:

“The allegations of negligence were shutting off the steam on the engine and applying the air brakes thereon by direction of said engine foreman, A. J. Carney, causing the cut of cars upon which the plaintiff was riding to slow up quickly and cause the plaintiff to fall over the end of the most distant car from the engine, at which point he was undertaking to set a brake on said car.”

This statement, if true, might make a total change of the theory on which plaintiff's (defendant in error's) case has been conducted. Plaintiff in error might with some little degree of plausibility claim that the act alleged as negligence was but a part of the *system*; that the slowing up process being governed by no fixed standard might fall within the category of things, the irregularities of which should be anticipated and the risk thereof assumed by the plaintiff. And this is the theory that seems to have been followed by counsel in their devious argument, and by the Honorable Commissioner Edwards, who was overwhelmed with work and no doubt failed to search the record.

Also, Mr. Justice Owen, who wrote the opinion of the State Supreme Court, copy of which is found in plaintiff in error's brief, undoubtedly passed beyond the erroneous statement of plaintiff in error far enough into the record to find that:

“In this case plaintiff below alleged *that the failure to uncouple* and the forcible and sudden stoppage of the cars with unusual quickness amounted to negligence.

It cannot be said that as a matter of law he, plaintiff, assumed the risk of this method of switching, if the allegation be true.” (Plaintiff in error's brief, p. 70).

The testimony of the plaintiff, Ward, supports the allegations of his petition.

There was no negligence proven, or attempted to be proven, or *claimed*, which inhered in the tool or appliance furnished, or in the place of work, or in the system or method of work, which existed prior to the injury for a sufficient time to have been possibly known to plaintiff. The negligence claimed and proven here was *coincident with the injury*, and therefore could not possibly be known and appreciated prior to the injury; therefore there can be no assumption of risk. With due respect to counsel *we feel* like saying that their contention to the contrary borders on the frivolous,—so closely as to justify this court in denying the writ of certiorari, or at least in affirming the judgment of the State Court on motion.

The question of whether this omission of the switch foreman to uncouple the train at *the proper* time for plaintiff's protection was properly submitted to the trial court to the jury, and by the jury found in plaintiff's favor. Plaintiffs in error are bound by this verdict. They are not in position to dispute it. We have not asked a recovery on account of any kind of negligence, except that charged against Carney in *doing the work*. We have not complained of any defects in the system or method of work. If Carney was *negligent* plaintiff ought to recover, if he was not plaintiff ought not to recover. That is the sole issue in this case. It is absurd to say that plaintiff assumed the risk of negligence, which he didn't and

couldn't know anything about till the very moment of his injury. Under the pleadings and the evidence the trial court really committed error against plaintiff in submitting any instruction at all to the jury on assumption of risk.

Counsel for plaintiffs in error have spent much time and labor, citing a number of authorities, in their protest against that part of instruction No. 10, which states that "the servant cannot be held to assume the risk of the master's *negligence*." As an abstract proposition is not a correct statement of the law, but as applied to the case at bar it is the same as to say that the servant cannot be held to assume the risk of the master's negligence created by the master—*of the kind charged and claimed by plaintiff in this case*." The error of the court was purely academic. The same may be said of the error of the court in its manner of submitting the question of contributory negligence to the jury. The court instructed the jury that if they found the plaintiff guilty of contributory negligence they should return a verdict for defendants; following the State rule, and not the rule contained in the Federal act. Though this is more favorable to the defendant than the rule in the Federal act, and is therefore entirely non-prejudicial, yet counsel vehemently insists that this theoretic error shows a disregard, a kind of *disloyalty* on the part of the courts toward the Federal

act. That is *almost* frivolous, and of course it can furnish no ground for the Honorable Court to assume jurisdiction of the case.

We respectfully refer this court to the case of *Chesapeake & O. R. Co. v. Proffit*, a case closely similar to the one at bar; except that it was brought in the first instance under the Federal Employers' Liability Act; our object being to show the views of this court on the questions of negligence and assumption of risk, upon a state of facts bearing the very closest resemblance to the present case.

“While an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer, or of those for whose proper care with respect to providing a reasonably safe conduct the employer is responsible, the employee has the right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work) and is not to be treated as assuming a risk that is attributable to employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known it.

“The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employ-

ment, but which result from the employer's negligence." Again: "The request" (for a particular instruction) "required defendant to be acquitted if the usual method of doing the work was pursued, irrespective of the question of the negligence of the yard crew in carrying it out. *Negligence in the doing of the work was the gravamen of plaintiff's complaint, in his declaration as in his evidence*, and defendant was not entitled to an instruction making the pursuit of a customary system decisive of the issue, without regard to whether due care was exercised in doing the work itself. Even if plaintiff knew and assumed the risk of an inherently dangerous method of doing the work, he did not assume the increased risk, attributable, not to the method, but to negligence in pursuing it." That is the theory of defendant in error's case.

Counsel for plaintiffs in error have fallen into such errors in their statement of the evidence and of the theory of defendant in error's case, that we feel constrained at the risk of appearing tedious, to point out some discrepancies, to set forth in as few words as possible for ourselves our own theory.

The negligence claimed by plaintiff in his petition was the action of the switch foreman, Carney, in fact, causing the engineer to slow up the train suddenly and abruptly, while pushing it up the incline, *and, second*, the

failure of said switch foreman to uncouple the cars in time to prevent the shock from reaching plaintiff.

Plaintiffs in error in their statement set forth the suddenness of the stoppage of the train as the sole negligence charged; and admit, and justify by claiming that it was necessary, because the train was being pushed forward so rapidly as to endanger the safety of the *company's property*, and of employers. Parenthetically we observe that by this claim plaintiffs in error admit negligence on the part of the company through either Carney or the engineer in getting up such a dangerous and unnecessary rate of speed, such a rate as constrained the switch foreman to *take the chance* of killing or injuring plaintiff (defendant in error) to prevent injury to the company's property "jumping from the frying pan into the fire."

If the speed of the train was too great for the safety of the *company's property* and of the employees, and the difficulty could be remedied only by an act that would endanger the life of plaintiff, there must have been negligence in one or the other; from our standpoint, in both. Both the foreman and the engineer have given their judgment in their testimony that the train was *going fast enough to be dangerous*; then if they could estimate the speed so accurately, the engineer at least, if experienced, must have had sufficient judgment to regulate the engine so that the speed

would not become dangerous. The logic of this is unanswerable. So that the only escape for the plaintiff in error is to admit the negligence but charge it to the engineer whose negligence was not embraced in plaintiff's claim. But the dodge could not be successful, because the plaintiff has the verdict of the jury on the issue of Carney's negligence in slowing up so suddenly and failing to uncouple at the proper time. There was certainly negligence somewhere. The engineer and the switch foreman between them had monkeyed with that train till it was in condition to hurt somebody or something, whether it went on or stopped. This *surely* could not be one of the ordinary risks of the *system or method* of switching, which the defendant in error can be held to have assumed as matter of law. Then it could not be *customary* for the company's servants to get the train in a condition that it was bound to hurt somebody, if the train got into that condition by the negligence of the defendants *in their manner of doing the work*, how can they now say that plaintiff must be held to have anticipated and assumed such risk?

The substance of the argument for plaintiffs in error, "boiled down" is that the defendant in error, as an experienced brakeman, knew that such things *do happen*, and must have known that they might happen in this instance, which is sufficient to require the trial court to instruct the jury, that plaintiff has assumed the risk as a matter of law!

On page 37 of their brief counsel say: "If the cars which plaintiff was to handle were going at too rapid a speed as they started over the hump, to protect the property of the company and the safety of the employees, it was a fact which would be apparent to any one who was an experienced switchman. The foreman says the speed of the cut was too great. The plaintiff has not contradicted the statement. *The plaintiff had the right to assume that the cars would be handled under the customary speed. This was a presumption against negligence upon which he might rely.*" Up to this point we had gotten the impression that by some kind of flank movement they had "uncoupled" the plaintiff from the right to assume anything except all risks "as matter of law." But in the language quoted by counsel that the high speed of the train was not customary and was the result of negligence which plaintiff could not be held to have assumed. There's no escape from that. Then how could the plaintiff be held to have foreseen and assumed that Carney, the switch foreman, would do a dangerous act to remedy an act of negligence, which it is admitted he did not assume and had a right to presume against? There's another package. "Ossa piled on Pelion." How can something be predicated upon nothing?

And the proof shows that the plaintiff, Ward, did not know the cars were running too fast. He swears he

didn't and counsel seek to explain that by claiming, if we understood them, that the high speed of four to five miles an hour never had reached plaintiff, but only the "slowed up" speed of two to five miles an hour. (Brief p. 73). "The plaintiff stated that there was no customary speed at which the cars were handled in the yards and that the speed of the cars prior to the accident was not nearly so rapid as he had seen. It had been reduced from four to five miles an hour, the speed the cars had attained as they approached and passed the hump, to be between two and five miles an hour, the speed at which they were moving at the time of the accident."

We are compelled to proceed to show the absurdity of all this. Five or six able and eminent attorneys have been engaged in writing this brief, having the advantage of advice from experts in every line of the railroad business, and among them all there seems not to have been one practical, mechanical head, who understands the laws of motion.

When plaintiff got on the car at the end of the cut and the cars started to move, the only motion they had was that received from the engine. As they were going up hill, this motion from the engine would of course cause the cars to jam together so that it would be difficult if not impossible to uncouple any of them. When the first car,—that is, we will say, the advance

car, passes the hump, it immediately by force of gravity acquires an increase of speed over what it had already received from the engine. The first effect of this is to cause the slack to run out "between this car and the car next to it, that is, cause this car to pull as far away from its neighbor as the coupler will permit. When this slack runs out there is the "*clicking, chucking*" noise mentioned in plaintiff in error's brief. The same thing happens to each car as it passes over the hump, all the way back to the engine, unless in the meantime a cut is made. If the engine "slows up," so that its motion is slower than that already communicated to the cars, the slack begins to run out next to the engine and that same clucking noise is heard on that end. If a cut has been made, this slackening noise from the end next to the engine continues up to where the cut was made. If no cut is made, there is a slackening noise on each side of the hump,—that proceeding upon and from the engine, and that caused by the action of gravity at or just past the hump. When the engine slows up or stops, a backward motion is communicated to the cars at that end, in opposition to the motion, already acquired by the cars from the engine in the first instance and from gravity. These two motions operating against each other will, unless the cars going over the hump have been cut, cause a violent and sometimes dangerous shock; but if the switch foreman does his duty

and separates the two sections before these two forces meet, no harm can ensue.

From what has been said it is plain that there is one instant when the pin can be drawn and the cars uncoupled with ease and without danger. That instant is just when the car is passing the hump and when the slack begins to run out, but *not after it runs out*. Each car as it passes over the hump could be uncoupled with ease until the retarding motion from the engine reaches the last car, which has the two motions first mentioned, that is, the one from the engine (the first one) and the one caused by gravity. When they meet—these opposing motions—there is a shock, as the cars pull apart; but the suddenness of the shock causes a momentary reaction, or “rebound,” producing a slack for an instant, when a quick person can draw the pin and uncouple. This is what we call uncoupling on the rebound, and is the only chance after the shock.

IN CONCLUSION.

It appears, first, that defendants had no right to the instruction asked of the trial court as to assumption of risk as matter of law—the facts being disputed all along the line, and it being entirely proper that that issue—assumption of risk—be submitted to the jury, assuming, *but not admitting*, that defendants were entitled to an instruction on that question; second, there was no prejudicial error in the instructions given by the court and excepted to by defendants; third, the benefit of the Federal Employers' Liability Act was not (a) claimed in the pleadings, nor (b) the right thereto proven, nor (c) was there any admission, express or implied, by the trial or the appellate state court that the application of the Federal Liability Act had been properly invoked under the state practice.

Wherefore, we most respectfully ask that the petition be denied.

T. G. CUTLIP,
W. S. PENDLETON,
For Respondent.

ADDITIONAL TRANSCRIPT OF RECORD.**Excerpts From Plaintiff's Petition, Which Petition Is Found on Pages 4 and 5 of Applicant's Printed Record.**

"That was the duty of the engine foreman to see that as soon as said cars should be shoved upon said switch as aforesaid, they should be cut loose from said engine and permitted to run down the grade of said switch until stopped by the said switchman. * * * That plaintiff, knowing that said cars had been shoved upon said switch as aforesaid, and knowing that it was then and there the duty of said engine foreman to cause the cars to be uncoupled from the said engine; and, by reason of obstructions in the way, being unable to see any signal made by said engine foreman, if any was given, noticed that said engine had ceased to exhaust; it being then and there the duty of said engine foreman to cause said engine to be so uncoupled from said cars, the plaintiff then and there, as it was his duty, went quickly from his position about the middle of the top of the front car on which he was standing to the front end of said car to apply the brake in order to diminish the speed of said car," etc. (pages 4 and 5, printed record).

"But plaintiff avers that the said engine foreman, the said A. J. Carney, and the defendant company, by and through the said foreman, neglected by and in violation of their duty as aforesaid, caused the engineer on the said engine to turn the throttle (thereby making the said engine cease to exhaust) and to apply the airbrakes to said engine, whereby the speed of said engine was retarded, so that the said engine ceased to shove said car and began to move more slowly than the said cars were moving, with the result that said cars began to check up on speed violently one at a time, until

finally the checking impulse reached the front car aforesaid just as plaintiff was stooping over as aforesaid to turn said brake, when said car was checked in motion so violently and so suddenly that plaintiff was thrown over in front of said car to the ground between the tracks of said roadbed, a distance of about twelve feet; and plaintiff, being so near the moving cars coming towards him and being so wounded and stunned by the said fall, that he could not rise to his feet."

Note that the aforesaid negligence in causing the cars to be slowed up violently is not charged as the proximate cause of plaintiff's injuries, but on page 5 of case-made, in the last paragraph of said petition, the plaintiff alleges that "his injuries aforesaid were caused by the defendant's negligence in failing through said engine foreman to promptly uncouple said cars at said time."

It is difficult to understand how petitioners could have made such an oversight—should have failed entirely to include in their statement of their case to this Honorable Court that which respondent claimed in his petition, in the trial court and in his brief to the Supreme Court of the State, to be the cause of his injuries; and how they could build up such a labored argument on a misconstruction of respondent's contention.

Extracts From Testimony of Respondent.

Pages 16 and 17 of applicant's printed record:

- "A. And as this car got over the switch leading toward No. 10, Carney said, 'Look out for them, Honey; I am going to hand you quite a bundle,' I never seen or heard no more.
- A. And we shoved in around on the lead, around a kind of a curve, behind a scale-house and down

until I knew we must have a pretty good bunch of cars, and was necessary for me to get busy with the brakes in order to control them, and I knew from looking back the amount of cars I had in there; I knew this one brake wasn't going to hold them. And seeing no signal from this other rider or Mr. Carney either, or no lamp whatever, I could not see any lamp. The engine ceased to exhaust, shut off rather; I stepped immediately to this brake to set it, the first brake, with the intention of setting that brake and stepping back and getting another one on the next car. About the time I got over to brake, just had stooped to the brake, and taken the slack out of the chain; just had stuck the stick in and the slack went out, and I fell forward."

Page 18 of printed record:

"Q. You may state how you happen to fall?

THE COURT: He did.

Q. The immediate cause, not further back, you say it was the jolt the car gave, a jerk or jolt there?

A. Yes, sir.

Q. Will you, as a switchman, know what made that jolt, how it happened to be made?

A. By the stopping of the engine and the failure to cut it off."

Page 21 of printed record:

"Q. What is the proceed signal?

A. Lamp raised and lowered, that way, in front of you.

Q. When the proceed signal was given, where were the cars, which side of the hump?

A. They were east of the hump.

Q. What is the next signal now to be given?

A. Stop signal.

Q. Do you know of any other signal to be given in such cases as that?

A. No, sir.

Q. Now, Mr. Ward, when a train proceed signal

has been given, and the engine starts—pushing the train backwards—do the cars jump together or fall apart?

A. The slack shoves together, all up in a bunch.

Q. Now, when you are switching back your cars, when is the proper time to cut a bunch of cars like that—is it before the stop signal is given or after?

A. Before it is given is the proper time to cut them off.

Q. After the signal is given and the checking process has passed where the cut is to be made, how long did you say it was, the instant when they could pull out the pin?

A. Just the moment the rebound comes back, and the slack, a man can pull the pin.

Q. Can they do it afterwards?

A. No, sir; because the slack runs back again.

Q. Does it take quick action?

A. Yes, sir.

Q. State whether or not it takes quick action to take the pin out and uncouple the cars after the stop signal is given?

A. Yes, sir; it does.

Q. As an expert, and as a switchman, I will ask you to state whether or not it is safe to risk it and wait until after the stop signal is given?

A. No, sir; it is destructive to the property and is dangerous to life and limb."

Page 26 of printed record:

"Q. When this engine ceased to exhaust, where was your car, the one you were on? How far from the grade—the hump.

A. About ten or twelve car lengths.

Q. Well, if the cars had been cut before the stop signal was given, or before the engine ceased to exhaust, would this jerking motion have passed on?

A. No, sir."

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY ET AL. *v.* WARD.

CERTIORARI TO THE SUPREME COURT OF THE STATE
OF OKLAHOMA.

No. 198. Submitted January 28, 1920.—Decided March 1, 1920.

The Federal Employers' Liability Act places a co-employee's negligence, when the ground of the action, in the same relation as that of the employer as regards assumption of risk. P. 22.

It is inaccurate to charge without qualification that a servant does not assume a risk created by his master's negligence, the rule being otherwise where the negligence and danger are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them. P. 21.

But the defense of assumed risk is inapplicable when the injury arises from a single act of negligence creating a sudden emergency without warning to the servant or opportunity to judge of the resulting danger. P. 22.

Where a switchman, when about to apply the brake to stop a "cut" of freight cars was thrown to the ground by a jerk due to delay in uncoupling them from a propelling engine when the engine was slowed, *held*, that he had a right to assume that they would be uncoupled at

the proper time, as usual, and did not assume the risk of a co-employee's negligent failure to do so. *Id.*

The error of a charge that contributory negligence will prevent recovery in an action under the Federal Liability Act, being favorable to defendants, does not require reversal of a judgment against them. P. 23.

The Seventh Amendment does not forbid a jury of less than twelve in a case under the Federal Employers' Liability Act tried in a state court. *Id. St. Louis & San Francisco R. R. Co. v. Brown*, 241 U. S. 223.

68 Oklahoma, —, affirmed.

THE case is stated in the opinion.

Mr. R. J. Roberts, Mr. W. H. Moore, Mr. Thomas P. Littlepage, Mr. Sidney F. Taliaferro and Mr. W. F. Dickinson for petitioners. *Mr. C. O. Blake and Mr. John E. Du Mars* were on the brief.

Mr. W. S. Pendleton for respondent. *Mr. T. G. Culip* was on the brief.

MR. JUSTICE DAY delivered the opinion of the court.

Suit was brought in the Superior Court, Pottawatomie County, Oklahoma, against the Chicago, Rock Island & Pacific Railway Company and A. J. Carney to recover damages for injuries alleged to have been received by Ward while he was employed as a switchman of the railway company in its yards at Shawnee. He recovered a judgment which was affirmed by the Supreme Court of Oklahoma, 68 Oklahoma, —. The ground upon which recovery was sought against the railway company and Carney, who was an engine foreman, was that Ward, while engaged in his duty as a switchman, was suddenly thrown from the top of a box car upon which he was about to apply a brake. The petition alleged, and the testimony tended to show, that Ward was engaged as a switch-

Opinion of the Court.

252 U. S.

man on a cut of cars which it was the duty of the engine foreman to cut loose from the engine pushing the cars in order that Ward might gradually stop the cars by applying the brake. It appears that at the time of the injury to Ward, the cut of cars had been pushed up an incline by the engine, over an elevation, and as the cars ran down the track the effect was to cause the slack to run out between them permitting them to pull apart sufficiently to be uncoupled, at which time it was the duty of the engine foreman to uncouple the cars. The testimony tended to support the allegations of the petition as to the negligent manner in which this operation was performed at the time of the injury, showing the failure of the engine foreman to properly cut off the cars at the time he directed the engineer to retard the speed of the engine, thereby causing them to slow down in such manner that, when the check reached the car upon which Ward was about to set the brake, he was suddenly thrown from the top of the car with the resulting injuries for which he brought this action.

The railway company and Carney took issue upon the allegations of the petition, and set up contributory negligence and assumption of risk as defenses. The trial court left the question of negligence on the part of the company and the engine foreman to the jury, and also instructed it as to assumption of risk by an employee of the ordinary hazards of the work in which he was engaged, and further charged the jury as follows:

"You are further instructed that while a servant does not assume the extraordinary and unusual risks of the employment yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the master's negligence nor such as are latent, or are only discoverable at

the time of the injury. The doctrine of an assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knew, or in the exercise of reasonable and ordinary care, should know the risk to which he is exposed, he will, as a rule, be held to have assumed them; but where he either does not know, or knowing, does not appreciate such risk, and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries."

Treating the case, as the court below did, as one in which the injury occurred while the petitioners and respondent were engaged in interstate commerce, this charge as to the assumption of risk was not accurate, in stating without qualification that the servant did not assume the risk created by the master's negligence. We have had occasion to deal with the matter of assumption of risk in cases where the defense is applicable under the Federal Employers' Liability Act, being those in which the injury was caused otherwise than by the violation of some statute enacted to promote the safety of employees. As this case was not one of the latter class, assumption of risk was a defense to which the defendants below were entitled. *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492; *Jacobs v. Southern Ry. Co.*, 241 U. S. 229.

As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & Ohio Ry. Co. v. DeAtley*, 241 U. S. 310, 315: "According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until

notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them." The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313. See also *Chesapeake & Ohio Ry. Co. v. Proffitt*, 241 U. S. 462, 468; *Erie R. R. Co. v. Purucker*, 244 U. S. 320.

Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care, on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of though inaccurate could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed had opportunity to know and appreciate it, and thereby assume the risk.

The trial court also charged that contributory negligence by Ward would prevent a recovery. This charge was more favorable to the petitioners than they were entitled to, as under the Federal Employers' Liability Act contributory negligence is not a defense, and only goes in mitigation of damages. The giving of this charge could not have been prejudicial error requiring a reversal of the judgment.

Another assignment of error, dealt with by the Supreme Court of Oklahoma, that a jury of less than twelve returned the verdict, conforming to the state practice, does not seem to be pressed here. In any event it is disposed of by *St. Louis & San Francisco R. R. Co. v. Brown*, 241 U. S. 223.

We find no error in the judgment of the Supreme Court of Oklahoma and the same is

Affirmed.